TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 70.

GEORGE W. CROWE, APPELLANT,

vs.

HENRY HARMON, ADMINISTRATOR OF THE ESTATE OF JERRY NEVILLE, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 5, 1905.

(19,827.)

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GEORGE W. CROWE, APPELLANT,

vs.

HENRY HARMON, ADMINISTRATOR OF THE ESTATE OF JERRY NEVILLE, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Transcript on Appeal.

1 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That plaintiff and defendant are both residents of the County of Santa Cruz, Territory of Arizona.

II.

That on or about the 3rd of January, 1900, Jerry Neville died in the said County of Santa Cruz, intestate, and at the time of his death, the said Jerry Neville was a resident of the said County of Santa Cruz.

III.

That on the 8th day of February, 1900, the defendant, Henry Harmon, received letters of administration upon the estate of the said Jerry Neville, from the Probate Court of the County of Santa Cruz, Territory of Arizona: That the said defendant, Henry Harmon, thereupon qualified and entered upon the duties of his office,
2 and that said letters of administration have not been revoked.

IV.

That between the 8th day of February, 1898, and the 8th day of February, 1900, the plaintiff performed services for the deceased, Jerry Neville, at the request of the said Jerry Neville, in bringing about a sale of the interest of the said Jerry Neville in the Pride of the West Mine, which said mine is located in said County of Santa Cruz, Territory of Arizona.

V.

That said services were reasonably worth the sum of Five Thousand Dollars ($5000.) and that the said Jerry Neville thereafter,

and previous to his death, promised to pay to this plaintiff for said services, the said sum of $5,000. But neither the said Jerry Neville nor his said administrator, Henry Harmon, nor any one else for their behalf, has paid the same, or any part thereof, and that the whole thereof is due, owing and unpaid.

VI.

That shortly after the appointment of the said Henry Harmon as administrator of the estate of the said Jerry Neville, deceased, the said administrator published notice to the creditors of the said Jerry Neville, requiring all persons having claims against the said estate to exhibit them with the necessary vouchers to the said administrator: That shortly after said publication and on or about the 10th day of November, 1900, this plaintiff duly presented to the said
3 defendant as such administrator, for allowance, his claim against the said estate for the said sum of Five Thousand Dollars ($5000.) which said claim was duly verified by the oath of this plaintiff.

VII.

That the ten days allowed by law for action on the said claim, by said administrator has elapsed, and the said administrator has notified this plaintiff that he has rejected the said claim of this plaintiff for the said sum of Five Thousand Dollars ($5,000).

VIII.

That the estate of the said Jerry Neville is solvent, and amply able to pay all of the debts of said estate.

Wherefore, Plaintiff prays for judgment against the said defendant for the said sum of Five Thousand Dollars ($5,000.) together with legal interest thereon from the said 10th day of November, 1900, and for plaintiff's costs of suit herein.

HEREFORD & HAZZARD.
Attorneys for Plaintiff.

(Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. George W. Crowe, Plaintiff, *vs.* Henry Harmon, Adm'r, Defendant. Complaint. Filed this 25th day of Jan. @ 9 A. M. 1901. S. F. Noon, Clerk.

4 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes Henry Harmon, Administrator of the Estate of Jerry Neville, deceased, defendant in the above entitled action, and for answer to plaintiff's complaint demurs to said complaint, and says

that same is insufficient in law for the reason that it shows no cause of action.

Wherefore, defendant prays the judgment of the Court.

MARCUS A. SMITH, AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

And further answering plaintiff's complaint, defendant specially excepts and demurs to all of paragraphs VI and VII of said complaint, wherein plaintiff alleges "that shortly after said publication and on or about the 10th day of November, 1900, this plaintiff duly presented to the said defendant as such Administrator, for allowance, his claim against said Estate for the said sum of Five Thousand Dollars ($5000) which said claim was duly verified by the oath of
5 this plaintiff. That the ten days allowed by law for action on the said claim, by the said administrator has elapsed, and the said administrator has notified this plaintiff that he has rejected the said claim of this plaintiff for the said sum of Five Thousand Dollars ($5000.).

For the following reasons and for each of them, to-wit:

First. Plaintiff has never, at any time presented to this defendant any claim whatsoever, in legal form, against the said estate, for any sum whatever.

Second. Defendant says that plaintiff has prematurely brought this suit.

Wherefore, defendant prays that this suit be dismissed at cost of plaintiff, as the law directs.

MARCUS A. SMITH, AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

Defendant further answering Plaintiff's complaint, specially excepts and demurs to paragraph IV of plaintiff's complaint, which reads as follows, to-wit: "That between the 8th day of February, 1898, and the 8th day of February, 1900, the plaintiff performed services for the deceased, Jerry Neville, at the request of the said Jerry Neville in bringing about a sale of the interest of the said Jerry Neville in the Pride of the West mine, which said mine is located in said county of Santa Cruz, Territory of Arizona," for the following reasons, and for each of them, to-wit:

6 First: Said paragraph shows on its face that plaintiff attempts to set up a cause of action based upon *"quantum meruit"* in bringing about a sale of the Pride of the West mine, but wholly fails to state that said mine was ever sold.

Second. Plaintiff fails to state when said mine was sold.

Third. Plaintiff fails to state for what amount said mine was sold.

Fourth. Plaintiff fails to state to whom said mine was sold.

Fifth. Plaintiff fails to state whether said mine was sold for cash or on credit. And if sold on credit, fails to show that the purchase price has ever been paid.

Sixth. In said paragraph, plaintiff fails to show what services, if

any, he ever performed for the said Jerry Neville. That said paragraph is vague, unintelligable, obscure, and does not show defendant what evidence is necessary for his defense. Defendant is unable to answer said paragraph intelligently. That the said paragraph is wholly insufficient in law.

Wherefore, defendant prays judgement of the Court.

MARCUS A. SMITH AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

And further answering plaintiff's complaint, defendant specially excepts and demurs to all of paragraph V of said complaint which reads as follows, to-wit: "That said services were reasonably worth the sum of Five Thousand Dollars ($5000) and that said Jerry Neville thereafter, and previous to his death, promised to
7 pay to this plaintiff for said services, the said sum of $5000. But neither the said Jerry Neville nor his said administrator, Henry Harmon, nor any one else for their behalf, has paid the same, or any part thereof, and that the whole thereof is due, owing and unpaid," for the following reasons and for each of them, to-wit:

First. Each and every of the Exceptions set out against paragraph IV.

Second. Said paragraph fails to show that the said services were reasonably worth the said sum of Five Thousand Dollars, or any part thereof. That said paragraph wholly fails to show any consideration for the alleged promise by the said Jerry Neville to pay the said plaintiff the sum of Five Thousand Dollars. That for the above reasons the said paragraph is wholly insufficient in law.

Wherefore, defendant prays judgment of the Court.

MARCUS A. SMITH AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

And further answering plaintiff's complaint, defendant specially excepts and demurs to the prayer for relief therein for the reason that plaintiff does not pray in said prayer that the said sum of Five Thousand Dollars for which he prays therein, be paid in due course of administration as the law directs.

8 Wherefore, defendant says said prayer is insufficient in law and therefore, defendant prays judgment of the Court.

MARCUS A. SMITH AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

And further answering plaintiff's complaint, defendant denies each and every allegation therein contained, and demands strict proof of the same.

Wherefore, defendant prays judgement of this Honorable Court, that he be dismissed hence without day, and for his costs in this behalf expended.

MARCUS A. SMITH AND
RICHARDSON & DUFFY,
Attorneys for Defendant.

(Endorsed:) 80. In the District Court, Santa Cruz County, Arizona. No. 80. George W. Crowe, *vs.* Henry Harmon, administrator. Demurrer & answer. Filed March 14th, 1901 @ 2.00 P. M. S. F. Noon, Clerk. Marcus A. Smith and Richardson & Duffy, attorneys and counselors at Law, Nogales, Arizona.

9 In the District Court of the First Judicial District, Territory of Arizona in and for Santa Cruz County.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Action brought in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz and the complaint filed in said County of Santa Cruz in the office of the Clerk of said District Court.

In the name of the Territory of Arizona, to Henry Harmon, Administrator of the Estate of Jerry Neville, Deceased, Defendant, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above named plaintiff in the District Court of the First Judicial District of the Territory of Arizona, in and for Santa Cruz County, and answer the Complaint therein filed with the Clerk of this said Court, at Nogales, in said County, within ten days after the service upon you of this Summons, if served in this said County, or if served out of this said County and within this said Judicial District, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

10 Given under my hand and the seal of the District Court of the First Judicial District, Territory of Arizona, in and for the County of Santa Cruz this 25th day of January, 1901.

[SEAL.] S. F. NOON,
Clerk of said District Court.

OFFICE OF THE SHERIFF, *County of Santa Cruz, ss:*

I hereby certify that I received the within Summons on the 12" day of February, A. D., 1901, at the hour of 9" M., and personally served the same on the 7th day of March A. D., 1901, on Henry Harmon, being the defendant named in said Summons, by delivering to him in the County of Santa Cruz, a copy of said Summons, to which was attached a true copy of the Complaint mentioned in said Summons. Dated this 7th day of March A. D., 1901.

T. J. TURNER, *Sheriff,*
By GEO. W. PARKER
Deputy Sheriff.

Fees.

Service	$1.50
Copies	
Travel, miles	.30
Publication	
Total	$1.80

(Endorsed:) No. 80. District Court. First Judicial District, County of Santa Cruz, Territory of Arizona. Geo. W. Crowe Plaintiff *vs.* Henry Harmon, (administrator) Defendant. Summons. Filed Mar. 14th, 1901. S. F. Noon, Clerk Rec'd Feb. 12, 1901, 9 A. M. T. J. Turner, Sheriff, by B. J. Whiteside, Deputy.

11 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes the Defendant, Henry Harmon, Administrator of the Estate of Jerry Neville, deceased, and amends his original answer filed herein, and by way of amendment demurs to plaintiff's complaint and for grounds of demurrer, alleges: that said complaint fails to show that the claim sued on is the same claim presented to the Administrator for allowance and payment.

For amended answer the defendant denies that the claim sued on is the same claim filed before the said Administrator for allowance and payment, and defendant alleges that the claim filed before the administrator was a claim on a contract to pay ten per cent. of the purchase price of the mine mentioned in the complaint and the claim sued on is a *"quantum meruit"* on services alleged to have been rendered.

Wherefore, defendant prays as in his original answer, and for all general and proper relief.

MARK A. SMITH,
DUFFY & RICHARDSON,
Attorneys for Defendant.

12 (Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. G. W. Crowe *vs.* Henry Harmon, adm'r Jerry Neville, deceased. Amended answer.. Filed June 5, 1901. S. F. Noon, Clerk.

13 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Amended Complaint.

For his amended complaint, plaintiff complains and alleges:

I.

That plaintiff and defendant are both residents of the County of Santa Cruz, Territory of Arizona.

II.

That on or about the 3rd day of January, 1900, Jerry Neville died in the said County of Santa Cruz, Territory of Arizona, intestate, and at the time of his death, the said Jerry Neville was a resident of the said County of Santa Cruz.

III.

That on the 8th day of February, 1900, the defendant, Henry Harmon, received letters of administration upon the estate of the said Jerry Neville, from the Probate Court of the County of Santa Cruz, Territory of Arizona: That the said defendant, Henry Harmon, thereupon qualified as such administrator, and entered upon
14 the discharge of his duties, as such administrator, and that said letters of administration have not been revoked.

IV.

That between the 8th day of February, 1898, and the date of the death of said Neville, the plaintiff performed services for the said deceased, at the request of the said Jerry Neville, in bringing about a sale of the interest of the said Jerry Neville in the Pride of the West Mine, which said mine is located in said County of Santa Cruz, Territory of Arizona.

V.

That the particular nature of said services was the finding and procuring a purchaser, and in bringing about a sale of the interest of said deceased, together with the interest of his co-owner, Norman H. Chapin, in the said Pride of the West Mine to such purchaser; that the purchaser so found and procured by plaintiff was A. R. Wilfley of Denver, Colorado; that through the services and efforts of plaintiff, said deceased and said Chapin were enabled to sell, and did sell, to the said A. R. Wilfley, their said interests in said mine,

for the purchase price of One Hundred Thousand Dollars, of which the share of said Neville was Fifty Thousand Dollars.

VI.

That said services to said Neville were reasonably worth the sum of Five Thousand Dollars, and that the said Jerry Neville promised and agreed to pay plaintiff for said services, the said sum of Five Thousand Dollars, being ten per cent. of said purchase price; that as plaintiff is informed and believes, the whole of said purchase price has been paid to said Neville, or to said defendant; that neither the said Chapin, nor the defendant, has paid plaintiff the said sum of $5,000., nor any part thereof, and that the whole thereof is due, owing and unpaid.

VII.

That shortly after the appointment of the said Henry Harmon as administrator of the estate of the said Jerry Neville, deceased, the said administrator published notice to the creditors of the said Jerry Neville, requiring all persons having claims against the said estate to exhibit them with the necessary vouchers to the said administrator; that on or about the 10th day of November, 1900, and within the time after the first publication of said notice, allowed by law and by said notice, the claim thereinbefore set forth, duly verified by the oath of the claimant, and upon which this action is founded, was duly presented in writing, by the plaintiff, to the defendant, as such administrator, for allowance; and that the same was by him, as such administrator, on or about the tenth day thereafter, rejected.

VIII.

That the estate of the said Jerry Neville is solvent, and amply able to pay all of the debts of said estate.

Wherefore, Plaintiff prays judgment against defendant as such administrator for the sum of Five Thousand Dollars, with interest thereon from November 10, 1900, and for plaintiff's costs of suit, all to be paid in the due course of administration of said estate.

HEREFORD & HAZZARD,
Attorneys for Plaintiff.

(Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. Geo. W. Crowe, Plaintiff, *vs.* Henry Harmon, adm'r, Defendant. Amended complaint. Filed this 8th day of July, 1901, S. F. Noon, Clerk. Service admitted this 29th day of June, 1901. M. A. Smith, attorneys for Defendant. Hereford Q Hazzard, attorneys for Plaintiff.

17 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Affidavit of F. H. Hereford.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Frank H. Hereford, being first duly sworn on his oath says that he is one of the attorneys for the plaintiff in the above entitled action, and has had almost exclusive charge of the said action for the said plaintiff: That the plaintiff resides at Salida, in the State of Colorado; that about a month ago affiant was informed by the Honorable George R. Davis, Judge of the above entitled Court, that it was not yet determined whether or not the July term of said Court would be commenced to be held upon the 1st day of July, 1901, or upon the 8th day of July, 1901, and that the civil business of said Court would be taken up on the first four days of said term; in consequence thereof affiant failed to notify the plaintiff herein as to when it would be necessary for him to come to the Town of Nogales for the trial of this case; that thereafter, and about two weeks ago affiant
18 was informed that the July term of said Court would be held, the Honorable Judge Doan presiding, commencing about the 8th day of July, 1901; that your affiant then wrote to the plaintiff telling him of the time of the commencement of the said term of Court; that hearing nothing from the said plaintiff, affiant on or about the 5th day of July, 1901, telegraphed to the said plaintiff in relation to the setting of the said case; that there was no reply to said telegram from said plaintiff, but that the Western Union Telegraph Company's operator at Salida, Colorado, telegraphed back as follows: "Yours date Crowe signed Hereford & Hazzard undelivered. Crowe is in Boston, Massachusetts." That affiant does not know the address of said plaintiff in Boston, Massachusetts, or any way in which said plaintiff can be notified of the date upon which this term of Court commences, and when he will be required to be present; and affiant believes from the fact that the plaintiff is a mining man and travelling over the United States a great deal, that the said plaintiff did not receive affiant's letter notifying him of the time of the commencement of said term of this Honorable Court:

That the presence of the said plaintiff is necessary, and the evidence of said plaintiff is material, and that the plaintiff cannot safely go to trial on this cause without being personally present.

That if the plaintiff were present, affiant expects said plaintiff would testify that he knew the Pride of the West Mine,
19 and had frequently talked with Neville and Chapin, the owners of the said mine, about the sale of the same; that the said Neville and Chapin frequently told plaintiff that they would pay

anyone ten per cent. commission upon the selling price of the said mine, who would make a sale of the said mine for them; that during the month of March, 1899, Mr. Emerson Gee came to Nogales; that plaintiff knew him and got him to come over and look at the Pride of the West Mine; that plaintiff took him through the said mine, and showed him all the works and the ore in sight; that the said Gee then went away, and about two weeks thereafter returned with Mr. A. R. Wilfley; that plaintiff then took the said Gee and said Wilfley up to the said mine, and showed them the property thoroughly; that the said Gee and Wilfley then left for Virginia City, Nevada, and later on and from the said Virginia City, Nevada, they wired to the plaintiff to secure the said mine for the said Gee and Wilfley. That the said plaintiff entered into an arrangement with one Frank Olsen, who owned a portion of the said mine, and said plaintiff then made another arrangement with Neville and Chapin for the purchase of their interests in the said mine; that plaintiff then wired these facts to Mr. Gee; that thereafter the said Neville and Chapin accepted the arrangement made by plaintiff with the said Olson, Neville and Chapin; that said Gee and Wilfley came to Washington Camp, where the said Mine is situated, and made some little changes in the terms and conditions under which the said Neville and Chapin were to sell their interests in the said mine, that after the
20 changes were made, and the sale was consum-ated, and all papers drawn up, plaintiff went with Messrs. Gee and Wilfley and Mr. Chapin on the dump of the said mine, and there in the presence of the said Chapin stated to Messrs Wilfley and Gee the conditions upon which the said sale was to be made, and the fact that said plaintiff was to receive from the said Neville and Chapin 10% of the price for which said mine was agreed to be sold as a commission for the selling of said mine; that thereupon the said Chapin, in the presence of said Gee and Wilfley, stated that plaintiff's statement of the case was correct, and that plaintiff was to receive from him 10% of the amount for which he was selling his interest in said mine to the said Wilfley and Gee, and 10% of the amount for which Neville was selling his interest in said mine; That the conditions upon which the sale of said mine was made to Gee and Wilfley were as follows: A bond for one year was to be given for the sum of $100,000 and no payment was to be made until the expiration of the said one year, but at the expiration of the said one year, the entire purchase price of $100,000 was to be paid, $50,000 of which was to be paid to Chapin, and $50,000 of which was to be paid to Neville: That all the papers and said agreement were made at the house of plaintiff, and plaintiff assisted in drawing them up; that at the request of said Wilfley and Gee, the terms of the commission agreement between Neville and plaintiff, and between said Chapin and plaintiff, were not put into writing, on account of avoiding any com-
21 plications which might arise:

That said Neville was sickly, and that said Chapin attended to all the business for himself and for Neville; and that Neville stated several times to plaintiff, and as affiant is informed and believes, to both Wilfley and Gee, that all that Chapin had done in the matter

was satisfactory to him (Neville), and particularly was this so with respect to the 10% commission which this plaintiff was to receive from the sale of said mine:

That about nine months thereafter both Chapin and Neville died;

That at no time after the time when said contract for the sale of the said property was entered into, and during the lifetime of said Neville, and said Chapin, did either of them deny that plaintiff was entitled to 10% of the contract price for the sale of said mine, as a commission.

That Emerson Gee is a material witness and plff. could not safely go to trial without the said Emerson Gee being present. That the said Gee is a supervisor of Santa Cruz County and expected to be at the meeting of the Board of Equilization now being held in the Court house in this city of Nogales, Santa Cruz Co. Ariz., but the said Gee was unexpectedly called away from this Territory by the sickness of his wife.

That A. R. Wilfley and Emerson Gee are material witnesses for plaintiff; that plaintiff has endeavored to have the depositions of the said A. R. Wilfley & Emerson Gee taken, and for that pur-
22 pose obtained a stipulation from counsel for the defendant; and the interrogatories and cross-interrogatories were on June 14, 1901 forwarded to the said Wilfley at the residence of the said A. R. Wilfley in Denver, Colorado, and to Emerson Gee at his residence in Washington Camp, Ariz: That on July 5th, or July 6th, 1901, this affiant received a letter from the said A. R. Wilfley saying that he had been away from town; that he had just received the interrogatories and cross interrogatories; that he was then on his way to Court in a very important matter, but that he hoped to be able to have his deposition taken in this matter shortly and forwarded as required by law.

That neither the depositions of the said A. R. Wilfley nor that of said Emerson Gee have been received, and that plaintiff cannot safely go to trial without the evidence of said Wilfley and the said Emerson Gee.

That the evidence of the said Wilfley and the said Emerson Gee as to the transactions regarding the sale of the said mine, and the said commission of 10% to be paid to plaintiff, affiant expects would be the same as that of said plaintiff, as herein above set forth. That in addition thereto affiant expects the said Wilfley & the said Gee would testify that 10% on the purchase price is a reasonable amount for the services performed by the said plaintiff.

That under the Statutes of the Territory of Arizona, the plaintiff can only testify as to the transactions had by him with the
23 said Neville and Chapin by permission of this Honorable Court, and that in case such permission should not be given plaintiff would have to rely upon the testimony of said A. R. Wilfley and said Emerson Gee, as the said evidence could not be obtained from any other source that this affiant knows of.

That the affiant is convinced that the attendance of both the plaintiff and the said Wilfley & the said Emerson Gee can be obtained at the next term of Court, or their depositions can be taken

and presented at the trial of this case at the said next term of this Court:

That this continuance is not sought for the purpose of delaying this suit only, but in order that justice may be done.

That for another reason it would be unsafe to proceed to trial in this case in the absence of plaintiff, as such absence leaves plaintiff's counsel without any one to direct or instruct them, or to inform them in regard to matters and things which may arise in the trial of this case. That none of the said witnesses nor the plaintiff were in the Territory of Arizona at the time Court convened and the Callendar was called for the setting of cases & none of them have since been in this Territory.

FRANK H. HEREFORD.

Subscribed and sworn to before me this 8th day of July, 1901.

[SEAL.] S. F. NOON,
Clerk District Court First Judicial District of Arizona, Santa Cruz County.

24 (Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. Geo. W. Crowe, Plaintiff, *vs.* Henry Harmon, Admr. etc. Defendant. Affidavit of F. H. Hereford. Filed this 8th day of July, 1901. S. F. Noon, Clerk. Hereford & Hazzard, attorneys for Plaintiff.

25 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes the defendant, Henry Harmon, Administrator of the estate of Jerry Neville, deceased, and amends his answer filed herein, and demurs to the plaintiff's amended complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action; and upon the further ground that the said complaint fails to show that the claim sued on is the same claim presented to the Administrator for allowance and payment.

Wherefore, defendant prays the judgment of the court.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

And further answering plaintiff's amended complaint, the defendant alleges that the pretended cause of action in the
26 complaint set forth, is not owned by the plaintiff, but that a part thereof is owned by one A. R. Wilfley and one Emerson Gee, and that the said Wilfley and the said Gee and the plaintiff own the said pretended cause of action jointly, and that the

said Wilfley and the said Gee should be a party-plaintiff hereto. And the defendant alleges and avers that by reason of the foregoing, there is a defect of parties plaintiff hereto.

Wherefore, the defendant prays the judgment of the court.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

And further answering plaintiff's amended complaint, defendant alleges that he has no knowledge or information sufficient to form belief as to any of the allegations in paragraphs 4, 5, 6, 7 or 8 of the complaint contained, and, therefore, denies the same.

Wherefore, defendant prays the judgment of this court.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

27 TERRITORY OF ARIZONA, *County of Santa Cruz, ss:*

Henry Harmon being duly sworn, says; that he is the defendant in the above entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY HARMON.

Subscribed and sworn to before me this 21st day of December, 1901.

[SEAL.] FRANK J. DUFFY,
Notary Public.

(Endorsed:) # 80. In the District Court Santa Cruz Co., Arizona Territory. George W. Crowe, Plaintiff, *vs.* Henry Harmon, Adm'r. Est. Jerry Neville, deceased, Defendant. Answer to amended complaint. Frank J. Duffy, Nogales, Arizona, and Smith & Ives, Tucson, Arizona, Attorneys for Defendant. Filed Dec. 24, 1901. S. F. Noon, Clerk.

28 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes the defendant, and upon the interrogatories and answers thereto of A. R. Wilfley, heretofore filed herein, moves this court that the said A. R. Wilfley be brought in as a party plaintiff hereto.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

To Messrs. Hereford & Hazzard, Plaintiff's Attorneys:

Please take notice, That the foregoing motion will be brought on for hearing at the term of the District Court, in and for Santa Cruz County, to be held in the city of Nogales on the 2d day of January, 1902, at 9-30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated Nogales, December 23, 1901.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

29 (Endorsed:) # 80. In the District Court Santa Cruz Co., Arizona Territory. George W. Crowe, Plaintiff, *vs.* Henry Harmon, Adm'r Est. of Jerry Neville, deceased, Defendant. Notice of Motion. Frank J. Duffy, Nogales, Arizona, and Smith & Ives, Tucson, Arizona, Attorneys for Defendant. Filed Dec. 24, 1901. S. F. Noon, Clerk.

30 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes the defendant, and upon the interrogatories and answers thereto of Emerson Gee, heretofore filed herein, moves this Court that the said Emerson Gee be brought in as a party plaintiff hereto.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

To Messrs. Hereford & Hazzard, Plaintiff's Attorneys:

Please take notice, That the foregoing motion will be brought on for hearing at the term of the District Court, in and for Santa Cruz county, to be held in the City of Nogales on the 2nd day of January, 1902, at 9-30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated Nogales, December 23, 1901.

FRANK J. DUFFY,
SMITH & IVES,
Attorneys for Defendant.

31 (Endorsed:) # 80. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz. George W. Crowe, Plaintiff, *vs.* Henry Harmon, adm., Defendant. Notice of Motion. Filed Dec. 24, 1901. S. F. Noon, Clerk. Smith & Ives, Frank J. Duffy, att'ys for Def't.

32 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial on the 4th day of January, 1902, before the Court, a jury having been expressly waived by the parties hereto; Messrs. Hereford & Hazzard appearing as attorneys for the plaintiff, and Frank J. Duffy, Esq., and Messrs. Smith and Ives, appearing as attorneys for the defendant, and the said Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the case, and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decisions, the Court now finds the following facts:

I.

That plaintiff and defendant are both residents of the County of Santa Cruz, Territory of Arizona:

II.

That on or about the 3rd day of January, 1900, Jerry Neville died in the said County of Santa Cruz, Territory of Arizona, intestate, and at the time of his death the said Jerry Neville was a
33 resident of the said County of Santa Cruz.

III.

That on the 8th day of February, 1900, the defendant, Henry Harmon, received letters of administration upon the estate of the said Jerry Neville, from the Probate Court of the said County of Santa Cruz; that the said defendant thereupon qualified as such administrator and entered upon the discharge of his duties, and that said letters of administration have not been revoked.

IV.

That between the 8th day of February, 1898, and the 11th day of January, 1900, the plaintiff performed services for the said Jerry Neville, at the request of the said Neville, in bringing about a sale of the interests of the said Neville in the Pride of the West Mine, which mine is located in the said County of Santa Cruz; that the particular nature of said services was the finding and procuring of a purchaser, and bringing about a sale of the interests of the said Neville in the said Pride of the West Mine; that the purchaser so found and procured by plaintiff was A. R. Wilfley of Denver, Colorado; for which

services the said Neville agreed to pay to said plaintiff 10% of all moneys received by the said Neville, from the said Wilfley on account of the sale by the said Neville, and the purchase by the said Wilfley of the said mine. That one Norman Chapin was the agent of the said Jerry Neville in making the contract with this plaintiff under which this plaintiff acted, and which contract provided for
34 the payments to this plaintiff of the said ten per cent. for plaintiff's services:

V.

That the said A. R. Wilfley paid to the said defendant as such administrator for the interest of the said Neville, the sum of Fifty Thousand Dollars ($50,000.), as follows:

April 7, 1900,	$500.00
June 19, 1900,	4,500.00
September 19, 1900,	5,000.00
December 19, 1900,	5,000.00
March 20, 1901,	5,000.00
June 17, 1901,	5,000.00
December 7, 1901,	25,000.00

That this plaintiff was and is entitled to the sum of Five Thousand Dollars ($5,000.) being 10% of the said $50,000., for his services in bringing about the sale of the interest of the estate of the said Jerry Neville, in said Mine.

VI.

That shortly after the appointment of the said Henry Harmon as administrator of the estate of Jerry Neville, deceased, the said administrator published a notice to the creditors of the said Neville, requiring all persons having claims against the said estate to exhibit them with the necessary vouchers to the said administrator; that on or about the 10th day of November, 1900, and within the time after the first publication of said notice, allowed by law and by the
35 said notice, the claim of this plaintiff for the sum of Five Thousand Dollars ($5,000.) for services performed for the said Neville in bringing about the sale of the interest of the said Neville in the Pride of the West mine, verified in the manner required by law, and by the oath of this plaintiff, was duly presented in writing by the plaintiff to the defendant as such administrator, for allowance; That the said claim was by the said defendant, as such administrator, on or about the 20th day of November, 1900, rejected.

VII.

That the estate of the said Jerry Neville, deceased, is solvent, and amply able to pay all the debts of the said estate.

VIII.

That neither the said Jerry Neville, nor the said defendant, nor anyone else, has paid to the said plaintiff, the said sum of $5,000, or any part thereof, or anything on account thereof.

IX.

That all the allegations and averments of the plaintiff's complaint are true; and that all the denials and allegations of the defendant's answer are untrue.

And as conclusions of law from the foregoing facts, the Court now finds and decides:

I.

That the said defendant as administrator of the estate of Jerry Neville, deceased, is and was on the 10th day of November, 1900, indebted to the plaintiff herein in the sum of Five Thousand Dollars ($5,000.) payable at the times and in amounts set forth below.

II.

That plaintiff herein is entitled to a judgment against the defendant, as such administrator, for the sum of Five Thousand Dollars ($5,000.) with interest thereon as follows: On $1,000. thereof from the 10th day of November, 1900, to the first day of September, 1901, at the rate of 7% per annum; on $500. thereof from the 19th day of December, 1900, to the 1st day of September, 1901, at the rate of 7% per annum; on $500. thereof at the rate of 7% per annum, from the 20th day of March, 1901, to the 1st day of September, 1901; on $500. thereof from the 17th day of June, 1901, to the 1st day of September, 1901, at the rate of 7% per annum; and interest on the full sum of $2500. from the 1st day of December, 1901, until paid at the rate of 6% per annum. Also, interest on the remaining $2500. of said judgment from the 7th day of December, 1901, until paid at the rate of 6% per annum.

III.

That plaintiff is entitled to a judgment against the defendant herein as such administrator, for plaintiff's costs herein expended.

IV.

That the said sums of Five Thousand Dollars ($5,000.) with interest, and the costs herein, should be paid to the plaintiff by defendant as such administrator, in the due course of his administration of said estate.

Dated: January 10th, 1902.

GEO. R. DAVIS, *Judge.*

(Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. George W. Crowe, Plaintiff, *vs.* Henry Harmon, adm'r, Defendant. Findings and conclusions. Filed this 10th day of Jan., 1902, S. F. Noon, Clerk.

38 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Judgement.

This cause came on regularly for trial on the 4th day of January, 1902, Messrs. Hereford & Hazzard appearing as counsel for the plaintiff, and Messrs. Smith & Ives and Frank J. Duffy, Esq., appearing as counsel for the defendant; a trial by jury having been expressly waived by the respective parties, the cause was tried before the Court sitting without a jury; whereupon the testimony of witnesses, depositions and documents were given in evidence on the part of the defendant, and the evidence being closed, after argument by counsel the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the Court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith:

Whereford, by reason of the law and the findings aforesaid, it is ordered and adjudged, that George W. Crowe, the plaintiff, do have and recover of and from Henry Harmon, administrator of
39 the estate of Jerry Neville, deceased, the defendant, as such administrator, the sum of Five Thousand Three Hundred and Nineteen Dollars and fifty cents ($5319.50), together with interest theron from date until paid at the rate of six per cent. (6%) per annum; and with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $—. And that the said sums, and each thereof, be paid by the said Henry Harmon, administrator of the estate of Jerry Neville, deceased, as such administrator, in the due course of his administration of said estate.

Judgment rendered this 10th day of January, 1902.

GEO. R. DAVIS, *Judge.*

(Endorsed:) No. 80. In the District Court, Santa Cruz County, Arizona. George W. Crowe Plaintiff, *vs.* Henry Harmon, adm'r, Defendant. Judgment. Filed this 10th day of Jan, 1902. S. F. Noon, Clerk. Docketed.

40 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Now comes the defendant, and moves that judgment herein be arrested or set aside and for a new trial, and specifies the following grounds upon which such motion is based.

I.

That the court erred in admitting and rejecting evidence upon the trial.

II.

That the evidence does not sustain the judgment of the court. Dated Nogales, Ariz., January 10, 1902.

SMITH & IVES, *Tucson, Ariz., and*
FRANK J. DUFFY, *Nogales, Ariz.,*
Attorneys for the Defendant.

(Endorsed: #80. District Court Santa Cruz County. George W. Crowe *vs.* Henry Harmon, adm'r. Motion for new trial. Smith & Ives, att'y for d'f't. Filed Jan. 10, 1902, S. F. Noon, Clerk. Due & timely service of notice of the within Motion is duly admitted. Dated Nogales, J'y 10, 1902. Hereford & Hazzard, att'ys for pl'ff.

41 In the District Court of the First Judicial District of the Territory of Arizona in and for Santa Cruz County.

No. 80.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Stipulation.

JANUARY 4TH, 1902.

Mr. IVES: It is hereby stipulated that the evidence and proceedings in the case of Crowe *vs.* Trickey, shall constitute the evidence and proceedings in the case; provided, however, that *that* counsel for the defendant shall have the right to move to strike out certain portions of the depositions of Wilfley and Gee, and shall make such motions and submit them in court with the argument.

Mr. HEREFORD: And add there that the judgment rendered in this case shall be entered by the court separately and apart from the judgment in the other case.

Mr. IVES: Before proceeding with the argument, I would like to make the motion in the Harmon case. I will first take up the testimony of Wilfley, at answer to No. 11, about the middle of the page.

I moved to strike out that part of answer to the 11th interrogatory, beginning at the words: "We at once closed the deal
42 with Olsen for his half interest and made the first payment," and to the rest of the answer, on the ground that it was not responsive.

In case Your Honor should deny that motion, I move now, in the case against Harmon, to strike out the words: "Who represented himself and Neville," which is just two lines down from the place I started to read.

I claim there is nothing to identify Neville with that and it is, as far as he is concerned, irrelevant and incompetent. The Court ruled, denying said motion.

And in the same answer on the following page are the words: about the 12th line down: "It was understood and agreed by and between Chapin, who also represented Neville."

I move to strike those words out.

The Court ruled, denying the said motion.

Then, in answer to 19, the end of the answer, the last five lines: "In a conversation with Jerry Neville during the first part of 1899, he stated that he left the matter of the sale of the Pride of the West Mine to Chapin, and that he would abide by any terms Chapin might make, either as to price or commission." I move to strike that out as absolutely irresponsive.

The Court ruled, denying the said motion.

Of course, all the motions that I made with respect to these depositions in the other case, also apply to this case.

Mr. IVES: Then, with respect to the deposition of Mr. Gee,
43 I move to strike out the last two lines of the answer to 17. On the ground that it is not responsive and hearsay.

The Court ruled, denying this motion.

I move to strike out the answer to 21, as far as the defendant, Harmon, is concerned, on the ground, there is nothing in it which is evidence against Mr. Neville. That is a transaction between Mr. Crowe and Mr. Chapin; it does not in any way bind Mr. Neville or his estate.

The Court ruled, denying this motion.

That is all of the motions that I make.

(Endorsed:) No. 80. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz. Geo. W. Crowe, Plaintiff, *vs.* Henry Harmon, (adm'r) Defendant. Stipulation. Filed Jan. 24, 1902. S. F. Noon, Clerk.

44 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

Minute Entry of July 8, 1901.

No. 80.

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Adm'r, Defendant.

This cause came on regularly this day to be heard, Messrs. Hereford and Hazzard appearing as counsel for the plaintiff, and Messrs. Duffy and Richardson for the defendant, upon the motion of the plaintiff heretofore filed herein for a continuance of this cause for the term, and now offers in support thereof the affidavit of Frank H. Hereford, which is read to the Court, and the Court having heard the arguments of the respective counsel for and against said motion, and being fully advised therein, does now order that said cause be, and the same is hereby continued for the term.

Minute Entry of Jan. 2nd, 1902.

No. 80.

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Adm'r, Defendant.

It is hereby ordered that this cause be, and the same is hereby, set for trial, Saturday, January 4, 1902, at 9:30 o'clock A. M.

45 *Minute Entry of Jan. 4, 1902.*

No. 80.

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Adm'r, Defendant.

This cause coming on this day regularly to be heard upon the motion of the defendant that the Court require that A. R. Wilfley be made a party-plaintiff herein, Messrs. Hereford and Hazzard appearing as counsel for the plaintiff, and Messrs. Smith & Ives, and Frank J. Duffy, Esq., for the defendant; whereupon evidence was introduced by respective parties, for and against said motion, and the Court, having heard the arguments of counsel thereon, and being fully advised in the premises does deny said motion. And thereupon the matter came on to be heard upon the motion of the defendant

that the Court require Emerson Gee be made a party-plaintiff herein, and the Court having heard the evidence and arguments of counsel thereon, and being fully advised in the premises does deny said motion. The trial then proceeded upon the pleadings herein, in the presence of and before the Court sitting without a jury, a jury having been expressly waived in open Court by both parties hereto, and the plaintiff to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to wit: George W. Crowe, the plaintiff who was duly sworn, examined and cross-examined, and
46 thereupon the plaintiff rested his case. The defendant then, to maintain upon his part the issues herein, called as a witness the following named person, to wit: M. M. Trickey, who was duly sworn, examined and cross-examined, and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted to the Court, the same was by the Court taken under advisement.

Minute Entry of Jan. 10, 1902.

No. 80.

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Adm'r, Defendant.

This cause having been tried before the Court, fully argued and submitted at a previous day of the present term of this Court, and the Court having taken the same under advisement, and being now fully advised in the premises, does find the issues herein in favor of the plaintiff, and against the defendant herein, and hereby orders that judgment be entered in accordance with the prayer of the complaint herein. Whereupon the matter came on to be heard upon the motion of the defendant to set aside the judgment herein and for a new trial. On consideration whereof said motion is by the Court overruled and denied; to which order and ruling denying said motion the said defendant excepts, and gives notice of his appeal to the Supreme Court of this Territory.

47 (Endorsed:) No. 80. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz. Geo. W. Crowe, Plaintiff, vs. Henry Harmon, Admr., Defendant. Copy of minute entries.

48 TERRITORY OF ARIZONA, *County of Santa Cruz, ss:*

I, S. F. Noon, Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, do hereby certify that I herewith transmit the entire record, including the original papers on file in this Court, and copies of all

minute orders, in the case of George W. Crowe, Plaintiffs *vs.* Henry Harmon, Admr., Defendant, No. 80, to the Clerk of the Supreme Court of the Territory of Arizona, for the purpose of appeal, as provided by law.

Witness my hand and the seal of the said District [SEAL.] Court hereto affixed this 2nd day of June, A. D., 1902.

S. F. NOON,
Clerk of the said Court.

(Endorsed:) No. 80. In the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Santa Cruz. Geo. W. Crowe, Plaintiff, *vs.* Henry Harmon, (Admr.) Defendant. Clerk's certificate.

(Endorsed:) No. 80. District Court, First Judicial District, Santa Cruz County, Arizona. Geo. W. Crowe, Plaintiff, *vs.* Henry Harmon, (admr.) Defendant. Civil. Action Commission. Filed 25 day of Jan. 1901. S. F. Noon, Clerk. Hereford & Hazzard Plaintiff's Attorney. Smith and Ives, F. J. Duffy, Defendant's Attorney. No. 790. In the Supreme Court of the Territory of Arizona. Henry Harmon, Admr. *vs.* Geo. W. Crowe. Original papers. Filed June 9, 1902. James Allen Cox, Clerk. By Angie B. Parker, Deputy.

49 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

Deposition of A. R. Wilfley.

GEO. W. CROWE, Plaintiff,
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased, Defendant,

and

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Dec'd, Defendant.

It is hereby stipulated That the deposition of A. R. Wilfley, a witness on behalf of plaintiff in the above entitled actions may be taken before —— ——, a Notary Public in and for the County of ——, —— of ——, at —— in the said County, at such date as may be most convenient to him; and when so taken the said deposition may be used at the trial of said actions or either thereof subject to the same objections (except as to the form of interrogatories and as to the form of certification) as if the said witness were there personally present, and testifying therein.

Dated this 3rd day of June, 1901.

HEREFORD & HAZZARD,
Attorneys for Plaintiff.
MARCUS A. SMITH,
Attorneys for Defendant.

50 *Interrogatories to be Propounded to A. R. Wilfley.*

1st Interrogatory. State your name, age and residence.

2nd Interrogatory. State generally your occupation or profession; how long you have been engaged in it, and what experience you have had in it.

3rd Interrogatory. Are you acquainted with the plaintiff in this action, George W. Crowe? If so, state how long you have known him.

4th Interrogatory. Were you acquainted with Norman H. Chapin, deceased, in his life time? If so, state when you first met him.

5th Interrogatory. Do you know that certain mine, known as the Pride of the West Mine, situated in the Patagonia Mining District, Patagonia Mountains, Santa Cruz County, Arizona, and in or about what is known as Washington Camp? If so, how long have you known it, and when did you first hear of it?

6th Interrogatory. From whom did you first hear of the said mine?

7th Interrogatory. When did you first hear of the Pride of the West Mine?

8th Interrogatory. Who first called your attention to the Pride of the West Mine?

9th Interrogatory. Did you ever go expressly to see the Pride of the West Mine; and if so, at whose instance, or who got you to go and see it?

51 10th Interrogatory. After you had been to see the Pride of the West Mine, where did you go?

11th Interrogatory. If you returned again to the Pride of the West Mine, state with whom you returned, and for what purpose.

12th Interrogatory. What did you do when you saw the Pride of the West Mine on the second occasion?

13th Interrogatory. After seeing the Pride of the West Mine on the second occasion where did you go, and if you wrote or telegraphed to anyone in Santa Cruz County about the said mine, state to whom you telegraphed or wrote, and generally what you said.

14th Interrogatory. If, about that time, anyone obtained an option upon the Pride of the West Mine that you know of, state who it was; and if, growing out of that option, a sale of the said mine was made or arranged for, state all that you know about the said sale, or the arrangements for the sale; who the option was to be given by, who the sale was to be made by, to whom the option was to be given, or the sale made: Generally, what were the terms of the option or sale; what amount was to be paid for the property, when and how.

15th Interrogatory. Who, if you know, arranged or brought about this sale or option of the Pride of the West mine?

16th Interrogatory. If you returned to see the Pride of the West Mine a third time, state when that third time was, who was with you, who you met and what negotiations affecting the ownership

52 or possession of the said mine were had or entered into.

17th Interrogatory. If upon the third visit to the said Mine you entered into any negotiations or made any arrangements with

either Jerry Neville or Norman H. Chapin, state generally what that business was and if it had anything to do with an option upon or a sale of the interests of Neville and Chapin in the said Mine; state what price was to be paid, when and how it was to be paid; to whom it was to be paid; and who, if anyone, was to be paid a commission for bringing about the said sale.

18th Interrogatory. What per cent. of the price agreed upon for the interests of Neville and Chapin in the said mine, if any, was to be paid for the bringing about of this option or sale of the interests of the said Neville and Chapin in the said mine?

19th Interrogatory. If this option or sale of the interests of Neville and Chapin in the Pride of the West mine was so far consummated that an option or sale was arranged for, state when it was done, whether or not the consideration for the option or sale was paid, and generally, just what was done since that time to carry out the terms of the said option or sale.

20th Interrogatory. During any of these arrangements, or at any time, were you ever present at a conversation participated in by yourself, a Mr. Emerson Gee, Mr. Norman H. Chapin and George W. Crowe, in which the question of the amount of commission to be allowed to Mr. Crowe by Messrs. Neville and Chapin for bringing about this option or sale, came up?

53 21st Interrogatory. If you were present at such conversation as is referred to in the previous interrogatory, state as nearly as you can recollect, what was said and all that was said.

22nd Interrogatory. Did you at any time thereafter ever hear either the said Neville or the said Chapin make any statements as to the amount of money that Mr. Crowe, the plaintiff herein, should receive from the said Neville and Chapin for bringing about the sale of the said Mine? If so, state what either the said Neville or the said Chapin said at these subsequent conversations, and who were present, and when and where the conversations occurred.

23rd Interrogatory. If any conversation ever occurred at which either the said Neville or the said Chapin were present and in which the subject of the amount to be paid to Mr. Crowe for his efforts in bringing about this option or sale of the said Mine was referred to by anyone, state what was said, who was present, and where the conversation occurred.

24th Interrogatory. What has been done with the Pride of the West Mine since that time, and what is now being done? State generally the history of the Mine since you first saw it, with respect to the development work and improvements put upon it.

25th Interrogatory. What is the value of the said Pride of the West Mine at the present time?

26th Interrogatory. Do you know what the services of a man in bringing about the sale of mines, taking all circumstances into consideration, are reasonably worth: In other words, have you

54 had sufficient experience in such matters to be able to tell what such services are reasonably worth?

27th Interrogatory. What were the services of Mr. Crowe in bringing about the option of sale of the Pride of the West Mine at the time and place, and under the circumstances, worth?

28th Interrogatory. State anything else that you may know to the advantage of this plaintiff.

GEO. W. CROWE
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased.

Cross-interrogatories to be Propounded to A. R. Wilfley in Above Cause.

Question 1. Did not some person other than Geo. W. Crowe first call your attention to the Pride of the West mine and induce you to look at it with a view of purchasing?

Question 2. What person except Mr. Crowe so called your attention to it?

Question 3. Were you present at the time Crowe and N. H. Chapin made any agreement as to what Crowe should get in case he sold the mine, I mean the original agreement?

Question 4. If any option was taken on the mine by Crowe was the mine sold within the time of the option?

55 Question 5. Did not the time expire, and was not a new and separate Contract of sale made with the Administrator of Chapin's Estate?

Question 6. When did Crowe's option expire, and when was the sale consummated?

Question 7. Are the purchasers even yet bound to take the mine if they do not want it?

Question 8. Please describe what business was transacted with the Administrator, M. M. Trickey, touching the sale.

Question 9. In answer to the 21st direct interrogatory, if you have heard any conversation please give here, the language used, and not your conclusions from what was said.

Question 10. To whom was the commission of 10% to go in case the mine was sold? Was it not agreed that Crowe should really receive only 5 per cent. and the other 5 per cent. was to be paid to Mr. Wilfley?

Question 11. Are you not interested in the Commission? Have you not a claim on Crowe for part of it, in case he recovers what he sues for?

Question 12. Has not Mr. Wilfley also an interest in said Commission in case Crowe recovers it?

Question 13. Is it not a fact that you made the sale of the mine?

Question 14. What did Crowe ever do to induce the purchaser to take the mine?

56 Question 15. How long was it about, after Chapin's death before the mine was sold?

Question 16. What if anything did Crowe have to do with the sale, after the death of Chapin?

57 In the District Court of the First Judicial District, Territory of Arizona, in and for Santa Cruz County.

GEORGE W. CROWE, Plaintiff,
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased, Defendant,

and

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Suit No. —, Pending in the District Court for Santa Cruz County, Arizona.

Answers and deposition of A. R. Wilfley, of Denver, Colorado, to the accompanying direct and cross-interrogatories propounded to him in the above entitled cause, taken before E. Blanche Badger a Notary Public, at the office of said A. R. Wilfley, No. 410 Tabor Opera House Block, in the city of Denver, County of Arapahoe and State of Colorado, on the 3rd day of July, 1901, at two o'clock P. M., in accordance with the accompanying stipulation.

Answers of the Witness A. R. Wilfley.

To the first Interrogatory he answers:

58 A. R. Wilfley; age 40 years; am a resident of Denver, Colorado.

To the second interrogatory he answers:

Mining and mining machinery.

To the third interrogatory he answers:

Am well acquainted with the plaintiff, George W. Crowe, and have known him for the last ten years or more.

To the fourth interrogatory he answers:

I became acquainted with Mr. Chapin at the time and after the purchase of the Pride of the West Mine.

To the fifth interrogatory he answers:

I am familiar with the said Pride of the West mine; first heard of it in March, 1899.

To the sixth interrogatory he answers:

I first heard of it from Mr. Emerson Gee.

To the 7th interrogatory he answers:

I first heard of the Pride of the West Mine in March, 1899.

To the 8th interrogatory he answers:

Emerson Gee.

To the 9th interrogatory he answers:

I first went to see the Pride of the West Mine in March 1899. Mr.

Gee and myself were taken to the mine by George W. Crowe, who introduced me to N. H. Chapin.

To the 10th interrogatory he answers:

After making an examination of the mine, Mr. Gee and myself went to Virginia City, Nevada, where we contemplated put-
59 ting in a large concentrating plant. Not liking the outlook at Virginia City we determined to secure the Pride of the West mine, if possible, and Mr. Gee wired Mr. George W. Crowe to that effect.

To the 11th interrogatory he answers:

After leaving Virginia City Mr. Gee and I returned immediately to Washington camp, where we met Mr. George W. Crowe, who told us he had secured an option on the Pride of the West Mine, on the following terms: One-half, owned by Oleson, for forty thousand dollars, twenty-five thousand dollars cash and the balance in six, nine and twelve months. The other half, owned by Chapin and Neville, for sixty thousand dollars, same terms of payment. We at once closed the deal with Oleson for his half interest and made the first payment, after talking with Chapin, who represented himself and Neville. The terms of the purchase of their half interest were changed, and instead of taking their interest on a basis of sixty thousand dollars, twenty-five thousand cash and balance in six, nine and twelve months, we took a bond on it for one year, for one hundred thousand dollars, and no cash to be paid prior to the expiration of that time. The plaintiff, George W. Crowe, knowing that a change in the terms of purchase was liable to be made, had an agreement with N. H. Chapin, in the presence and hearing of myself, on the dump of the Pride of the West mine, on or about the 30th day of March, 1899, as follows: Crowe stated to Chapin and myself that in as much as the conditions of purchase were about to be changed, it was understood and agreed by and between Chapin, (who
60 also represented Neville), and the said Crowe, that in any deal made with myself and Gee, by him and Neville, that the said Crowe was to receive ten per cent. of any and all purchase money as a commission for negotiating a sale of their interest in the Pride of the West mine. In reply to this statement of said Crowe, Chapin stated that this was his understanding; that the said Crowe was to have and receive ten per cent. of any and all purchase money to be received by him for their interest in the Pride of the West mine, as a commission for making the sale.

To the 12th interrogatory he answers:

Made the deal, as above stated.

To the 13th interrogatory he answers:

Made the deal, as above stated, and returned to Denver. I sent no letter or telegram regarding the sale of the mine at that time.

To the 14th interrogatory he answers:

All I know about the options was what George W. Crowe told me, as already stated, and the option I secured. My answer to interrogatory 11th gives further reply to this question.

To the 15th interrogatory he answers:

George W. Crowe, as stated before.

To interrogatory 16th he answers:

When I returned to the Pride of the West Mine the third time it was merely on business regarding the working of the mine.

To the 17th interrogatory he answers:

I entered into no negotiations and had nothing whatever to
61 do regarding the deal for the mine on the third trip I made there, having made the negotiations as before stated.

To the 18th interrogatory he answers:

Ten per cent.

To the 19th interrogatory he answers:

The sale was perfected on the terms and conditions as before stated, with permission to mine and ship ore by the payment of royalty. At the end of the year Chapin and Neville had died and I made an agreement with the Administrators to extend the time, with privilege of making partial payments. At the present time fifty thousand dollars has been paid, leaving fifty thousand dollars still due. The only change in the original terms was an extension of time, and partial payments, and no royalty. In a conversation with Jerry Neville, during the first part of 1899, he stated that he had left the matter of the sale of the Pride of the West mine to Chapin, and that he would abide by any terms Chapin might make, either as to price or commission.

To the 20th interrogatory he answered:

I was not, Mr. Gee not being present, as I remember, at such conversation.

To the 21st interrogatory he answered:

I do not remember the exact words, but do remember that it was a clear understanding between George W. Crowe, N. H. Chapin and myself that George W. Crowe was to receive ten per cent. commission on any money I might pay to N. H. Chapin.

62 To the 22nd interrogatory he answers:

I do not remember of any further conversation with Chapin or Neville regarding commission, except that Jerry Neville told me that whatever arrangements Chapin made would be satisfactory to him.

To the 23rd interrogatory he answers:

There were no further conversations on this subject that I remember of.

To the 24th interrogatory he answers:

The Pride of the West Mine has been worked continuously since that time and mills have been erected for the treatment of the ore.

To the 25th interrogatory he answers:

The value of a mine is, in a measure, an unknown quantity. I do not wish to state any definite value.

To the 26th interrogatory he answers:

Ten per cent. is generally considered a fair commission for the sale of a mine.

To the 27th interrogatory he answers:

Taking into consideration the condition of the mine at the time I saw it, and the price which was to be paid for it, George W. Crowe was certainly entitled to ten per cent. commission.

To the 28th interrogatory he answers:
I believe I have stated all I know about the matter.

63 *Answers to Cross Interrogatories.*

To Cross Interrogatory 1 he answers:
Yes.
To cross interrogatory 2 he answers:
Mr. Emerson Gee.
To cross interrogatory 3 he answers:
I was not present, and did not hear the original agreement.
To cross interrogatory 4 he answers:
An option was given to me during the time Crowe told me his option covered.
To cross interrogatory 5 he answers.
The time of my option with Chapin and Neville expired and I renewed the option with the administrators of Chapin and Neville.
To cross interrogatory 6 he answers:
Crowe's option was relinquished when I took the option on the mine. The first payment on the mine was made about April 1st, 1900.
To cross interrogatory 7 he answers:
No.
To cross interrogatory 8 he answers:
When my option expired with Chapin and Neville I made
64 a deal with M. M. Trickey on the following terms: Ten thousand cash, ten thousand dollars in three months, ten thousand in six months, ten thousand nine months, ten thousand twelve months and fifty thousand eighteen months.
To cross interrogatory 9 he answers:
I cannot remember the exact words of the conversation.
To cross interrogatory 10 he answers:
Two-thirds of the commission was to go to myself and associates and one-third to George W. Crowe.
To cross interrogatory 11 he answers:
I have had nothing whatever to do with the bringing of this suit, am bearing no part of the expense, but, if I felt so disposed, believe I might claim a part of the commission if it was collected.
To cross interrogatory 12 he answers:
I do not expect to get any of the commission.
To cross interrogatory 13 he answers:
I bought the mine, one-half for myself the other half for Mr. Emerson Gee and others.
To cross interrogatory 14 he answers:
Mr. Crowe took myself and Mr. Gee to the mine the first time I
65 ever saw it, and I understood from Mr. Gee that Mr. Crowe first called his attention to the mine.
To cross interrogatory 15 he answers:
The deal with the administrators was made about the first of April, 1900. I do not remember just when Chapin and Neville died.
To cross interrogatory 16 he answers.
Nothing.

A. R. WILFLEY.

Subscribed and sworn to this 3rd day of July, 1901.

E. BLANCHE BADGER,
Notary Public.

STATE OF COLORADO, *County of Arapahoe, ss:*

I, E. Blanche Badger, a notary public within and for the county of Arapahoe, state of Colorado, do hereby certify that the foregoing answers of A. R. Wilfley, the witness before named, were made before me, and were sworn to and subscribed before me, by the said witness.

Given under my official signature and seal, this 3rd day of July, A. D., 1901.

My commission expires August 17th, 1901.

[SEAL.] E. BLANCHE BADGER,
Notary Public.

66 *Costs of Deposition.*

24 folios, at 20 cts. per folio	$4.80
Notary fee, oath	.50
Postage	.10
	$5.40

Paid by plaintiff,

E. BLANCHE BADGER,
Notary Public.

(Endorsed:) In the District Court of the First Judicial District, Territory of Arizona, in and for Santa Cruz County. George W. Crowe, Plaintiff, *vs.* M. M. Trickey, Administrator of the estate of Norman H. Chapin, deceased, Defendant and George W. Crowe, *vs.* Henry Harmon, Administrator of the Estate of Jerry Neville, deceased, Defendant. Deposition of A. R. Wilfley. Filed July 19, 1901. S. F. Noon, Clerk. No. 790, 791. In the Supreme Court of the Territory of Arizona. Henry Harmon, Admr. *vs.* George W. Crowe. Deposition of A. R. Wilfley. Filed June 9, 1902. James Allen Cox, Clerk. By Angie B. Parker, Deputy.

(Envelope endorsed:) To the Clerk of the District Court, Santa Cruz County, Nogales, Arizona. George W. Crowe, *vs.* M. M. Trickey, etc. 81 and George W. Crowe *vs.* Henry Harmon, etc. 80 Deposition of A. R. Wilfley. Received this Package from the hands of E. Blanche Badger, the officer before whom the enclosed deposition was taken. John C. Twombly, P. M. J. J. Vick Roy, Asst. P. M. Denver, Colo. Received from the post office at Nogales and filed, July 1, 1901 S. F. Noon, Clerk. Opened at request of Duffy and Richardson, July 19, 1901, S. F. Noon, Clerk. No. 790, 791. Supreme Court, Territory of Arizona. Filed June 9, 1902, James Allen Cox, Clerk. By Angie B. Parker, Deputy.

67 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased, Defendant,

and

GEO. W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Dec'd, Defendant.

Deposition of Emerson Gee.

It is hereby stipulated that the deposition of Emerson Gee, a witness on behalf of plaintiff in the above entitled actions, may be taken before —— ——, a Notary Public in and for the County of Santa Cruz, Territory of Arizona, at —— in the said County of Santa Cruz, at such date as may be most convenient to him; and when so taken the said deposition may be used at the trial of said actions or either thereof, subject to the same objections (except as to the form of interrogatories and as to the form of certification) as if the said witness were there personally present, and testifying therein.

Dated this 3rd day of June, 1901.

HEREFORD & HAZZARD,
Attorneys for Plaintiff.
MARCUS A. SMITH,
Attorneys for Defendant.

68 *Interrogatories to be Propounded to Emerson Gee.*

1st Interrogatory. State your name, age and residence.

2nd Interrogatory. State generally your occupation or profession; how long you have been engaged in it, and what experience you have had in it.

3rd Interrogatory. Are you acquainted with the plaintiff in this action, George W. Crowe? If so, state how long you have known him.

4th Interrogatory. Were you acquainted with Norman H. Chapin, deceased, in his lifetime? If so, state when you first met him.

5th Interrogatory. Do you know that certain mine, known as the Pride of the West Mine, situated in the Patagonia Mining District, Patagonia Mountains, Santa Cruz County, Arizona, and in or about what is known as Washington Camp? If so, how long have you known it, and when did you first hear of it?

6th Interrogatory. From whom did you first hear of the said mine?

7th Interrogatory. When did you first hear of the Pride of the West Mine?

8th Interrogatory. Who first called your attention to the Pride of the West Mine?

9th Interrogatory. Did you ever go expressly to see the Pride of the West mine; and if so, at whose instance, or who got you
69 to go and see it?

10th Interrogatory. After you had been to see the Pride of the West Mine, where did you go?

11th Interrogatory. If you returned again to the Pride of the West Mine, state with whom you returned, and for what purpose.

12th Interrogatory. What did you do when you saw the Pride of the West Mine on the second occasion?

13th Interrogatory. After seeing the Pride of the West Mine on the second occasion where did you go, and if you wrote or telegraphed to anyone in Santa Cruz County about the said Mine, state to whom you telegraphed or wrote, and generally what you said.

14th Interrogatory. If, about that time, anyone obtained an option upon the Pride of the West Mine that you know of, state who it was; and if, growing out of that option, a sale of the said mine was made or arranged for, state all that you know about the said sale or the arrangements for the sale; who the option was to be given by, who the sale was to be made by, to whom the option was to be given, or the sale made: Generally, what were the terms of the option or sale; what amount was to be paid for the property, when and how.

16th Interrogatory. If you returned to see the Pride of the West this sale or option of the Pride of the West mine?

16th Interrogatory. If you returned to see the Pride of the West Mine a third time, state when that third time was, who was
70 with you, who you met and what negotiations affecting the ownership or possession of the said mine were had or entered into.

17th Interrogatory. If upon the third visit to the said Mine you entered into any negotiations or made any arrangements with either Jerry Neville or Norman H. Chapin, state generally what that business was and if it had anything to do with an option upon or a sale of the interests of Neville and Chapin in the said Mine; state what price was to be paid, when and how it was to be paid; to whom it was to be paid; and who, if anyone, was to be paid a commission for bringing about the said sale.

18th Interrogatory. What per cent. of the price agreed upon for the interests of Neville and Chapin in the said mine, if any, was to be paid for the bringing about of this option or sale of the interests of the said Neville and Chapin in the said mine?

19th Interrogatory. If this option or sale of the interests of Neville and Chapin in the Pride of the West mine was so far consummated that an option or sale was arranged for, state when it was done, whether or not the consideration for the option or sale was paid, and generally, just what was done since that time to carry out the terms of the said option or sale.

20th Interrogatory. During any of these arrangements, or at any

time, were you ever present at a conversation participated in by yourself, a Mr. A. R. Wilfley, Mr. Norman H. Chapin and George W. Crowe, in which the question of the amount of commission to be allowed to Mr. Crowe by Messrs. Neville and Chapin for bring-
71 ing about this option or sale, came up?

21st Interrogatory. If you were present at such conversation as is referred to in the previous interrogatory, state as nearly as you can recollect, what was said and all that was said.

22nd Interrogatory. Did you at any time thereafter ever hear either the said Neville or the said Chapin make any statements as to the amount of money that Mr. Crowe, the plaintiff herein, should receive from the said Neville and Chapin for bringing about the sale of the said mine? If so, state what either the said Neville or the said Chapin said at these subsequent conversations and who were present, and when and where the conversations occurred.

23rd Interrogatory. If any conversation ever occurred at which either the said Neville or the said Chapin were present and in which the subject of the amount to be paid to Mr. Crowe for his efforts in bringing about this option or sale of the said Mine was referred to by anyone, state what was said, who was present, and where the conversation occurred.

24th Interrogatory. What has been done with the Pride of the West Mine since that time, and what is now being done? State generally the history of the Mine since you first saw it, with respect to the development work and improvements put upon it.

25th Interrogatory. What is the value of the Pride of the West Mine at the present time?

26th Interrogatory. Do you know what the services of a
72 man in bringing about the sale of mines, taking all circumstances into consideration, are reasonably worth: In other words, have you had sufficient experience in such matters to be able to tell what such services are reasonably worth?

27th Interrogatory. What were the services of Mr. Crowe in bringing about the option of sale of the Pride of the West Mine at the time and place, and under the circumstances, worth?

28th Interrogatory. State anything else that you may know to the advantage of this plaintiff.

GEO. W. CROWE
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased.

Cross-interrogatories to be Propounded to Emerson Gee in Above Cause.

Question 1. Did not some person other than Geo. W. Crowe first call your attention to the Pride of the West mine and induce you to look at it with a view of purchasing?

Question 2. What person except Mr. Crowe so called your attention to it?

Question 3. Were you present at the time Crowe and N. H. Chapin made any agreement as to what Crowe should get in case he
73 sold the mine, I mean the original agreement?

Question 4. If any option was taken on the mine by Crowe was the mine sold within the time of the option?

Question 5. Did not the time expire, and was not a new and separate Contract of sale made with the Administrator of Chapin's Estate?

Question 6. When did Crowe's option expire, and when was the sale consummated?

Question 7. Are the purchasers even yet bound to take the mine if they do not want it?

Question 8. Please describe what business was transacted with the Administrator, M. M. Trickey, touching the sale.

Question 9. In answer to the 21st direct interrogatory, if you have heard any conversation please give here, the language used, and not your conclusions from what was said.

Question 10. To whom was the commission of 10% to go in case the mine was sold? Was it not agreed that Crowe should really receive only 5 per cent. and the other 5 per cent. was to be paid to Mr. Wilfley?

Question 11. Are you not interested in the Commission? Have you not a claim on Crowe for part of it, in case he recovers what he sues for?

Question 12. Has not Mr. Wilfley also an interest in said Commission in case Crowe recovers it?

Question 13. Is it not a fact that you made the sale of
74 the mine?

Question 14. What did Crowe ever do to induce the purchaser to take the mine?

Question 15. How long was it about, after Chapin's death before the mine was sold?

Question 16. What if any thing did Crowe have to do with the sale, after the death of Chapin?

75 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

GEORGE W. CROWE, Plaintiff,
vs.
M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased, Defendant,

and

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Deposition of Emerson Gee.

Suit No. —, Pending in the District Court for Santa Cruz County, Arizona.

Answers and deposition of Emerson Gee, of Washington Camp, Arizona, to the accompanying direct and cross interrogatories propounded to him in the above entitled cause, taken before me, E. Blanche Badger, a Notary Public in and for Arapahoe County, Colorado, at the office of A. R. Wilfley, 410 Opera House Building in the city of Denver, County of Arapahoe and state of Colorado on the 9th day of July, 1901, at ten o'clock P. M. in accordance with the accompanying stipulation.

Answers of the Witness Emerson Gee.

To the first interrogatory he answers:

Emerson Gee; Age, fifty years; Residence, Washington
76 Camp, Arizona.

To the second interrogatory he answers:

Operating and managing mines, and the milling and reduction of ores. Have been engaged in above business for about thirty years. In operating in several different states, and handling a large variety of ores, have acquired a very considerable experience.

To the 3rd interrogatory he answers:

I am very well acquainted with the plaintiff in this case, George W. Crowe, and have known him for about twelve years.

To the 4th interrogatory he answers:

I was acquainted with Mr, Chapin. I first met him during the early part of March, 1899.

To the 5th interrogatory he answers:

I have been engaged in the active management of the Pride of the West mine for more than two years, and have become familiar with the property. I first heard of the mine in February or March, 1899.

To the 6th interrogatory he answers:

From George W. Crowe.

To the 7th interrogatory he answers:

While in Nogales on my way into Sonora Mr. Crowe telephoned me about it, asking me to come over to the camp. This was in
77 February or March, 1899.

To the 8th interrogatory he answers:

George W. Crowe.

To the 9th interrogatory he answers:

I went to see the Pride of the West Mine at Mr. Crowe's invitation, and he went with me.

To the 10th interrogatory he answers:

I went north again to attend to some business matters, and then to Denver.

To the 11th interrogatory he answers:

I returned with Mr. Wilfley to see the mine.

To the 12th interrogatory he answers:

I talked with Mr. Crowe about a price on the mine.

To the 13th interrogatory he answers:

I went with Mr. Wilfley to Virginia City, Nevada, and from there I wired to Mr. Crowe to secure the Pride of the West Mine for us if possible, and I returned at once to Washington Camp.

To the 14th interrogatory he answers:

On my arrival at Washington Camp Mr. Crowe told me that he had secured an option on both the Oleson interest of one-half, and on the Chapin and Neville interest, representing the other
78 half. He had a price agreed upon with Oleson of forty thousand dollars, twenty-five thousand cash, and the balance in three deferred payments, and the Chapin and Neville interest at sixty thousand dollars, on the same terms of payment.

To the 15th interrogatory he answers:

Mr. Crowe brought about the sale of the mine, and it was due to his efforts that a sale was effected, and neither Mr. Wilfley nor myself would have been likely to have returned, except at his instance.

To the 16th interrogatory he answers:

I returned to the mine towards the end of March, 1899. I met Mr. George W. Crowe, and I made a payment to Oleson, and Mr. Wilfley and myself closed the purchase with him and at once entered into possession of the one-half interest.

To the 17th interrogatory he answers:

Mr. Wilfley and myself, with Mr. Crowe, had a talk with Mr. N. H. Chapin in regard to the terms of the purchase of the Chapin and Neville interest, and it was finally agreed to change the terms of the option, increasing the price to One hundred thousand dollars, to be paid at the expiration of one year. This agreement was made about the last of March, 1899, and was well understood by Mr. George W. Crowe, and an agreement was at once made by Mr. Chapin and himself to the effect that Mr. Crowe was to receive ten per cent of
79 the price agreed upon, as a commission for bringing about the sale. In this transaction, as well as the rest of the business transacted, Mr. Chapin represented both himself and Mr. Neville.

To the 18th interrogatory he answers:

Mr. Chapin agreed with Mr. Crowe that ten per cent was to be paid to Mr. Crowe for bringing about the sale.

To the 19th interrogatory he answers:

This agreement was made at the mine on or about the last of March, 1899. At the end of the year, both Chapin and Neville being dead, the time for the purchase of the mine was extended and different terms of payment were arranged for, the terms being changed from the original terms of a royalty and full payment at the end of the year, to a new arrangement of payments consisting of a cash payment and deferred payments in three, six, nine, twelve and eighteen months, final payment to be made at the expiration of eighteen months. We immediately begun operating the mine under this arrangement.

To the 20th interrogatory he answers:

I was present and participated in such a conversation.

To the 21st interrogatory he answers:

I would not attempt to repeat all that was said at this conversation, but the proposition was made by Mr. Crowe, and agreed to by Mr. Chapin, that he was to receive ten per cent of the amount
80 of the sale price agreed upon.

To the 22nd interrogatory he answers:

I do not remember having heard Mr. Chapin or Mr. Neville say anything about the matter of commission to be paid Mr. Crowe, after the deal was consummated.

To the 23rd interrogatory he answers:

I do not remember of having heard of it subsequently to the consummation of the deal.

To the 24th interrogatory he answers:

The mine has been operated steadily since we acquired possession of it, and is now being worked with a force of about fifty men. A mill and smelter have been erected and are in operation steadily. Over a thousand feet of shafts, drifts, winzes and upraises have been driven in the mine. Tramways and roads have been constructed and the mine is now being equipped with a hoisting plant and machine drills.

To the 25th interrogatory he answers:

I would prefer not to establish a price on the mine.

To the 26th interrogatory he answers:

I have been accustomed to the transfers of mining properties for a number of years, and I consider the services are reasonably worth the ten per cent claimed.

81 To the 27th interrogatory he answers:

I consider the services of Mr. Crowe in bringing about the sale of The Pride of the West Mine are worth the amount claimed for Chapin and Neville interest, and the amount he received from Oleson, which was more than three thousand dollars.

Answers of the Witness Emerson Gee to Cross-interrogatories.

To the first cross interrogatory he answers:
No.
To the 2nd cross interrogatory he answers:
No person.
To the third cross interrogatory he answers:
I was.
To the 4th cross interrogatory he answers:
Our agreement to purchase from Mr. Chapin was made as described in answer to the direct interrogatory No. 17, during Crowe's option. That is the only sale of which I have any knowledge.
To the 5th cross interrogatory he answers:
For answer to this cross interrogatory I refer to my answer to direct interrogatory No. 19.

82 To the 6th cross interrogatory he answers:
I do not know when Crowe's option expired. In answer to the remainder of the question I refer to answer to direct interrogatory No. 19.
To the 7th cross interrogatory he answers:
No.
To the 8th cross interrogatory he answers:
The transaction was conducted entirely by Mr. Wilfley, and I was not present at the time.
To the 9th cross interrogatory he answers:
I cannot remember the exact language.
To the 10th cross interrogatory he answers:
Mr. Crowe was to receive one-third of the commission and the balance of the commission was to be paid to Mr. Wilfley and his associates.
To the 11th cross interrogatory he answers:
I have no claim.
To the 12th cross interrogatory he answers:
I do not know.
To the 13th cross interrogatory he answers:
No, I was a purchaser and not a seller.
To the 14th cross interrogatory he answers:

83 Mr. Crowe first brought the mine to the notice of the purchasers and induced them to examine it.
To the 15th cross interrogatory he answers:
The final terms were agreed upon on the first day of April, 1900. I do not remember the date of Chapin's death.
To the 16th cross interrogatory he answers:
I do not know.

EMERSON GEE.

Subscribed in my presence and sworn to before me this 9th day of July, 1901.

E. BLANCHE BADGER,
Notary Public.

[SEAL.]

STATE OF COLORADO, *County of Arapahoe*, ss:

I, E. Blanche Badger, a Notary Public within and for said county and state do hereby certify that the foregoing answers of Emerson Gee, the witness before named, were made before me, and were sworn to and subscribed before me by said witness.

Given under my official signature and seal this 9th day of July, A. D., 1901.

E. BLANCHE BADGER,
Notary Public.

[SEAL.]

Mw Commission expires August 17th, 1901.

Costs of this Deposition.

24 folios typewriting, at 20c,	$3.60
Swearing witnesses,	.50
Postage,	.10
Paid by plaintiff,	$4.20

84 (Endorsed:) No. 790. 791. In the Supreme Court of the Territory of Arizona. George W. Crowe, Plaintiff, *vs.* M. M. Trickey, etc., and George W. Crowe, Plaintiff, *vs.* Henry Harmon, etc., Defendant. Deposition of Emerson Gee. Filed June 9, 1902. James Allen Cox, Clerk. By Angie B. Parker, Deputy.

(Envelope endorsed:) George W. Crowe, Pl'ff, *vs.* M. M. Trickey, Adm'r, etc., and George W. Crowe, Pl'ff, *vs.* Henry Harmon, Adm'r, etc. 80 and 81. Deposition of Emerson Gee. Received this package from the hands of E. Blanche Badger, the officer before whom the enclosed deposition was taken. John C. Twombly, P. M. Denver, Colorado. By C. B. Wilson, Deputy P. M. To the Clerk of the District Court of Santa Cruz County, Nogales, Arizona. Received from the Post Office at Nogales and filed July 18, 1901. S. F. Noon. Opened at request of Duffy and Richardson, July 19, 1901, S. F. Noon, Clerk. No. 790. 791. Supreme Court, Territory of Arizona. Filed June 9, 1902. James Allen Cox, Clerk. By Angie B. Parker, Deputy.

85 In the District Court of the First Judicial District of the Territory of Arizona in and for Santa Cruz County.

GEORGE W. CROWE, Plaintiff,
vs.
HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Defendant.

Bill of Exceptions.

Testimony of George W. Crowe.

Direct examination:

I reside at Patagonia, Santa Cruz County, Arizona. I knew Norman H. Chapin in his lifetime very well, and, also, knew Jerry Neville. I knew the Pride of the West Mine. It is located in Washington Camp, Santa Cruz County, Arizona. I know A. R. Wilfley and Mr. Emerson Gee. The first time I saw Emerson Gee at Washington Camp was along, somewhere, from the 10" to the 15"—somewhere along the first part of March, 1899. I understood that he was to be in Nogales and I called him up by telephone.

(It was admitted that shortly after the appointment of Harmon as administrator of the estate of Neville, the administrator published notice to creditors requiring all persons to exhibit claims with necessary vouchers to the administrator. A paper was handed witness by Mr. Hereford.) It was the claim against the estate of Neville presented Harmon by Crowe.

I have seen that paper. I have had it in my possession.
86 I handed it to Mr. Harmon in the neighborhood of the 15" of November—after the 10"—of the year, 1900. Mr. Harmon rejected the claim. He never gave any response to it. He took that and afterwards denied the whole amount.

(It was admitted by stipulation of the parties that the paper was offered to Mr. Harmon within the time required by law to be offered and that the action was brought within the statutory time, and that the estate is solvent.)

Q. "Mr. Crowe, what did you do towards bringing about the sale of the interests of Jerry Neville and N. H. Chapin, in the Pride of the West mine?"

A. "I secured the purchasers for the mine—Emerson Gee and A. R. Wilfley."

Q. "At the time you secured them did you have any paper claiming to be an option upon their interests in the Pride of the West mine? Did you have any paper with respect to this mine?"

A. "No, sir. I had no option in writing on the Pride of the West or any interest in the mine at the time that Mr. Gee or Mr. Wilfley first came out there." I have never received from any person any payment or any part of the commission of ten per cent. which Mr. Wilfley and Mr. Gee have testified to as due me. There is abso-

lutely no one, to my knowledge, other than myself, who has a claim or is entitled to make a claim against the estates of either Mr. Chapin or Mr. Neville for, or on account of the ten per cent. commission or any part thereof. With reference to what I did in bring-
87 ing about the sale of this property,—I got Mr. Gee to go over and make the first examination of the mine. Subsequent to that time I took Mr. Wilfley and Mr. Gee up and examined the mine and assisted—in fact, everything in connection with the sale; everything was perfected at my house. All the details of the sale were made and carried out at my house in Washington Camp. I brought about the meetings between Neville and Chapin upon the one part, and the other upon the other part, at the mine. Also, at my home in Washington Camp.

I have had experience in buying and selling mines and paying commissions for the purchase and sale of mines. I consider ten per cent. a fair and reasonable commission for performing the service I performed in bringing about the sale of the interests of the estate of Neville and Chapin in these mines at that time.

Cross-examination by Mr. IVES:

Since this action was commenced Mr. Wilfley has not made any assignment to me of his interest in this claim. He has made an assignment to me prior to the commencement of this action, he gave me a written paper. I have not the paper with me. It is somewhere in my effects up at Patagonia. It is dated sometime in the early part of November; about the time of the conversation I related a while ago, when he wanted to know why I didn't collect this. Previous to this assignment of Mr. Wilfley's interest to me, there had been an agreement between Mr. Wilfley and myself
88 whereby Wilfley was to have two-thirds of any commission I might recover. That agreement was made sometime after the deal was closed. I don't remember now just the date.

The COURT:

Q. You say before that, Wilfley had a two-thirds interest in this commission.

A. Yes, sir; that is, Wilfley and his associates.

(Mr. IVES:)

Q. I mean Wilfley and his associates?

A. His associates; I don't know who they were, unless they were the several owners in the mine.

Mr. Hereford offered the deposition of Emerson Gee. The deposition was taken under a stipulation signed by the attorneys for the respective parties and bearing date June 30, 1901, to the effect that such deposition might be "used at the trial of the action, subject to the same objections except as to the form of interrogatories and as to the form of certification as if the said witnesses were there personally present and testifying therein." The deposition pursuant to such stipulation was taken before a Notary Public on the 9" day of July, 1901.

Mr. EMERSON GEE testified as follows:

My name is emerson Gee; my age is 50 years; my residence is Washington Camp, Arizona. My occupation is operating and managing mines, and the milling and reduction of ores. Have been engaged in the above business for about 30 years. In operating
89 in several different states and handling a large variety of ores have acquired a very extensive experience. Am very well acquainted with the plaintiff in this case, George W. Crowe, and have known him for about twelve years. I was acquainted with Mr. Chapin in his life-time. I first met him during the early part of March 1899. I have been engaged in the active management of the Pride of the West mine for more than two years, and have become familiar with the property. I first heard of the mine in February or March 1899. I first heard of the mine through George W. Crowe. I first heard of the Pride of the West mine while in Nogales on my way into Sonora. This was in February or March, 1899. George W. Crowe first called my attention to the Pride of the West mine. I went to see the Pride of the West mine at Mr. Crowe's invitation and he went with me. After I had been to see the Pride of the West mine I went north again to attend to some business maters and then to Denver. I returned with Mr. Wilfley to see the mine. When I saw the Pride of the West mine on the second occasion, I talked with Mr. Crowe about the price on the mine. After seeing the Pride of the West mine on the second occasion I went with Wilfley to Virginia City, Nevada, and from there I wired to Crowe to secure the Pride of the West mine for us if possible, and I returned at once to Washington Camp. Mr. Crowe brought about the sale of the Pride of the West mine, and it was due to his efforts that a sale was effected. I returned to the Pride of the West mine towards the end of March 1899. I met George W. Crowe
90 and I made a payment to Olsen, and Mr. Crowe, Mr. Wilfley and myself closed the purchase with him and at once entered into the possession of the one-half interest.

Q. If upon the third visit to the said mine you entered into any negotiations or made any arrangement with either Jerry Neville or Norman H. Chapin, state generally what that business was, and if it had anything to do with an option or a sale of the interests of Neville and Chapin in the said mine. State what price was to be paid, when and how it was to be paid, to whom it was to be paid, and who, if anyone, was to be paid a commission for bringing about the said sale?

A. Wilfley and myself with Mr. Crowe had a talk with N. H. Chapin in regard to the terms of the purchase of the Chapin and Neville interest and an agreement was made. This agreement was made about the last of March, 1899, and was well understood by George W. Crowe, and an agreement was at once made by Chapin and himself to the effect that Crowe was to receive 10% of the price agreed upon as a commission for bringing about the sale. In this transaction, as well as the rest of the business transacted, Chapin represented both himself and Mr. Neville.

(Mr. Ives moved to strike out the following portion of the above

answer: "This agreement was made about the last of March, 1899, and was well understood by George W. Crowe, and an agreement was at once made by Chapin and himself, to the effect that Mr. Crowe was to receive 10% of the price agreed upon for bringing about the sale," on the ground that it was a conclusion. Motion denied. Exception by Mr. Ives.)

Mr. Ives moved to strike out the last part of the above answer commencing with the words "in this transaction" on the
91 ground that they are not responsive and hearsay. Motion denied. Mr. Ives took an exception.)

Q. What per cent. of the price agreed upon for the interests of Neville and Chapin in said mine, if any, was to be paid for the bringing about of this option or sale of the interests of the said Neville and Chapin in the said mine?

A. Mr. Chapin agreed with Mr. Crowe that 10% was to be paid to Mr. Crowe for bringing about the sale.

(Mr. Ives moved to strike out this answer, on the ground that it was a conclusion.)

Motion denied.

The witness continuing, testified:

This agreement was made at the mine on or about the last of March, 1899. I was present at a conversation participated in by myself, Mr. Wilfley, Mr. Chapin and Mr. Crowe, in which the question of the amount of commission to be allowed to Mr. Crowe by Messrs. Neville and Chapin for bringing about this option or sale came up. I would not attempt to repeat all that was said at this conversation, but the proposition was made by Mr. Crowe, and agreed to by Mr. Chapin, that he was to receive 10% of the amount of the sale price agreed upon. I do not remember having heard Mr. Chapin or Mr. Neville say anything about the matter of commission to be paid to Crowe after the deal was consummated.

Q. If any conversation ever occurred at which either the said Neville or the said Chapin were present and in which the
92 subject of the commission to be paid to Crowe for his efforts in bringing about this option or sale of the said mine were referred to by anyone, state what was said, who was present and where the conversation occurred.

A. I do not remember of having heard of it subsequently to the consummation of the deal.

The mine has been operated steadily since we acquired possession or it, and is now being worked with a force of about 50 men. A mill and smelter have been erected and are in operation steadily. Over a thousand feet of shaft, winzes and upraises have been driven in the mine. Tramways and roads have been constructed and the mine is now being equipped with a hoisting plant and machine drills. I would prefer not to establish a price on the mine. I have been accustomed to the transaction of mining properties for a number of years, and I consider the services of a man in bringing about the sale of such a mine, reasonably worth the 10% claimed. I con-

sider the services of Mr. Crowe in bringing about the sale of the Pride of the West mine worth the amount claimed for the Chapin and Neville interest, and the amount he received from Olsen, which was more than $4000.

Cross-examination:

No person other than George W. Crowe first called my attention to the Pride of the West mine or induced me to look at it with a view to purchasing. I was present at the time Mr. Crowe and Mr. Chapin made an agreement as to what Crowe should get in
93 case he sold the mine—I mean the original agreement.

Q. If any option was taken on the mine by Crowe, was the mine sold within the time of the option?

A. Our agreement to purchase from Chapin was made as described in my direct examination during Crowe's option. That is the only sale of which I have any knowledge.

Question 5. Did not the time expire and was not a new and separate contract of sale made with the Administrator of Chapin's estate.

Answer. I refer to my answer to direct interrogatory No. 19.

In answer to Cross Int. No. 6. I do not know when Mr. Crowe's option expired. I refer to answer to the direct Interrogatory No. 18.

The purchasers are not even yet bound to take the mine if they don't want it. The business transacted with the administrator, M. M. Trickey, touching the sale, was conducted entirely by Mr. Wilfley and I was not present at the time.

I cannot remember the exact language of the conversation between Wilfley, Mr. Chapin, Mr. Crowe and myself with respect to which I have testified. Mr. Crowe was to receive one-third of the commission of 10% in case the mine was sold. The balance of the commission was to be paid to Mr. Wilfley and his associates.

Q. Were you not interested in the commission? Have you not a claim on Crowe for part of it in case he recovers what he sues for?

94 A. I have no claim.

I do not know whether Mr. Wilfley has an interest in said commission in case Mr. Crowe recovers it. It is not a fact that I made a sale of the mine. I was a purchaser, not a seller. Mr. Crowe first brought the mine to the notice of the purchasers and induced them to examine it.

Q. How long was it about, after Mr. Chapin's death, before the mine was sold?

A. The final terms agreed upon the first day of April, 1900. I do not remember the date of Mr. Chapin's death. I do not know what, if anything, Mr. Crowe had to do with the sale after the death of Mr. Chapin.

Mr. Hereford offered the deposition of A. R. Wilfley. The deposition was taken under a stipulation signed by the attorneys for the respective parties and bearing date June 30, 1901, to the effect that such deposition might be used at the trial of the action, subject to

the same objections except as to the form of interrogatories and as to the form of certification as if the said witness were there personally present and testifying therein. The deposition pursuant to such stipulation was taken before a Notary Public on the 3d day of July, 1901.

Mr. A. R. WILFLEY testified as follows:

My name is A. R. Wilfley; my age is 40 years; I am a resident of Denver, Colorado. My profession is mining and mining
95 machinery. I am well acquainted with the plaintiff, George W. Crowe, and have known him for the last ten years or more. I became acquainted with Norman H. Chapin at the time and after the purchase of the Pride of the West mine. I am familiar with the Pride of the West mine. I first heard of it in March, 1899. I first heard of it from Mr. Emerson Gee in March, 1899. Mr. Emerson Gee first called my attention to the Pride of the West mine. I first went to see the Pride of the West mine in March, 1899. Mr. Gee and myself were taken to the mine by Mr. George W. Crowe, who introduced me to Norman H. Chapin. After making an examination of the mine, Mr. Gee and myself went to Virginia City, Nevada, where we contemplated putting in a concentrating plant. Not liking the outlook of Virginia City, we determined to secure the Pride of the West mine, if possible, and Mr. Gee wired to George W. Crowe to that effect.

Q. 11. If you returned again to the Pride of the West mine, state what time you returned, and for what purpose?

A. After leaving Virginia City Mr. Gee and I returned immediately to Washington Camp where we met George W. Crowe. We at once closed the deal with Mr. Olsen for his half interest, and made the first payment after talking with Mr. Chapin, who represented himself and Neville. The terms of the purchase of their half interest were changed, and, instead of taking their interest on a basis of $60,000.—$25,000 cash, and balance in 6, 9, and 12 months, we took a bond on it for one year for $100,000, and no cash
96 to be paid prior to the expiration of that time. The plaintiff, George W. Crowe, knowing that a change in the terms of purchase was liable to be made, had an agreement with Norman H. Chapin in the presence and the hearing of myself on the dump of the Pride of the West mine on or about the 30" day of March, 1899, as follows: Mr. Crowe stated to Mr. Chapin and myself that inasmuch as the conditions of purchase were about to be changed, it was understood and agreed by and between Mr. Chapin, (who also represented Neville) and the said Crowe, that in any deal made with myself and Gee by him and Neville, that the said Crowe was to receive ten per cent of any and all purchase money as commission in negotiating the sale of their interest in the Pride of the West mine. In reply to this statement Chapin stated to Crowe that that was his understanding; that the said Crowe was to have and receive ten per cent of any and all purchase money to be received by him for their interest in the Pride of the West mine, as a commission for making the sale.

Mr. Ives moved to strike out all of the answer after the words "Where we met Crowe" as being not responsive. Motion denied. Mr. Ives excepted.

(Mr. Ives moved to strike out the words "Who represented himself and Neville" on the ground that there is nothing to identify Neville, and, also, the words, "It was understood and agreed by and between Chapin who also represented Neville," on the ground that there is nothing to identify Neville and that the words are irrelevant and incompetent. Motion denied. Mr. Ives took an exception.)

Q. 12. What did you do when you saw the Pride of the West mine on the second occasion?

97 A. Made the deal as above stated.

Q. 13. After seeing the Pride of the West mine on the second occasion, where did you go; and, if you wrote or telegraphed to anyone in Santa Cruz County about the said mine, state to whom you telegraphed or wrote, and, generally, what you said.

A. Made the deal as above stated, and returned to Denver. I sent no letter or telegram regarding the sale of the mine at that time.

Q. 14. If about that time anyone obtained an option upon the Pride of the West mine that you know of, state who it was, and if growing out of that option a sale of the mine was made or arranged for, state all that you know about the said sale or the arrangements for the sale, who the option was to be given by, who the sale was to be made by, to whom the option was to be given or the sale made. Generally, what were the terms of the option or sale, what amount was to be paid for the property, when and how.

A. All I know about the option was what George W. Crowe told me as already stated, and the option I secured. My answer to interrogatory 11 gives further reply to this question.

George W. Crowe arranged and brought about the sale or option of the Pride of the West mine as stated before.

Q. 16. If you returned to see the Pride of the West mine a third time, state when that third time was, who was with you, who you met and what negotiations affecting the ownership or pos-

98 session of the said mine were had or entered into.

A. When I returned to the Pride of the West mine the third time, it was merely on business regarding the working of the mine.

Q. 17. If upon the third visit to the said mine you entered into any negotiations or made any arrangements with either Jerry Neville or N. H. Chapin, state generally what that business was, and if it had anything to do with an option upon, or a sale of the interests of Neville and Chapin in the said mines. State what price was to be paid, when and how it was to be paid, whom it was to be paid to, and who, if anyone, was to be paid a commission for bringing about the said sale.

A. I entered into no negotiations and had nothing whatever to do regarding the deal for the mine on the third trip I made there, having made the negotiation as before stated.

Q. 18. What per cent. of the price agreed upon for the interest of Neville and Chapin in the said mine, if any, was to be paid for the

bringing about of this option or the sale of the interest of the said Neville and Chapin in the said Mine?

A. Ten per cent.

Q. 19. If this option or sale of the interests of Neville or Chapin in the Pride of the West mine was so far consummated that an option or sale was arranged for, state when it was done, whether or not the consideration for the option or sale was paid, and, generally, just what was done since that time to carry out the terms of the said option or sale.

99 A. The sale was perfected on the terms and conditions as before stated, with permission to mine and ship ore, by the payment of royalty. At the end of this year Chapin and Neville had died, and I made an agreement with the administrators to extend the time, with the privilege of making partial payments. At the present time $50,000. has been paid, leaving $50,000. still due. The only change from the original terms was an extension of time and partial payments and no royalty. In a conversation with Jerry Neville during the first part of 1899, he stated that he had left the matter of the sale of the Pride of the West mine to Chapin and that he would abide by any terms Chapin might make either as to price or commission.

(Mr. Ives moved to strike out all that portion of the last answer, commencing with the words "in a conversation with Jerry Neville," as being not responsive.)

Motion denied.

(Mr. Ives took an exception.)

Q. 20. During any of these arrangements, or at any time, were you ever present at a conversation participated in by yourself and Mr. Emerson Gee, Mr. Chapin and Mr. Crowe in which the question of the amount of commission to be allowed to Crowe by Neville and Chapin for bringing about this option or sale came up?

A. I do not know—Mr. Gee not being present as I remember at such conversation.

Q. 21. If you were present at such conversation as is re-

100 ferred to in the previous interrogatory, state as nearly as you can recollect what was said and all that was said.

A. I do not remember the exact words, but do remember that it was a clear understanding between Mr. Crowe and Mr. Chapin and myself that Crowe was to receive ten per cent. commission on any money I might pay to Mr. Chapin.

Q. 22. Did you at any time thereafter ever hear either the said Neville or the said Chapin make any statements as to the amount of money that Mr. Crowe, the plaintiff herein, should receive from the said Neville and Chapin for bringing about the sale of the said mine? If so, state what either the said Neville or the said Chapin said at these subsequent conversations, and who were present and when and where the conversation occurred?

A. I do not remember any further conversation with Chapin or Neville regarding commission, except that Jerry Neville told me that whatever arrangements Chapin made would be satisfactory to him.

(Mr. Ives moved to strike out the above answer as not responsive.)
Motion denied.
(Mr. Ives excepted.)

Q. 23. If any conversation ever occurred at which either the said Neville or the said Chapin were present, and in which the subject of the amount to be paid to Crowe for his effort in bringing about this option or sale of the said mine was referred to by any-
101 one, state what was said, who was present and where the conversation occurred?

A. There were no further conversations on this subject that I remember of.

The Pride of the West mine has been worked continuously since that time and mills have been erected for the treatment of the ore. The value of the mine is in a measure an unknown quantity and I do not wish to state any definite value. Ten per cent. is generally considered a fair commission for the sale of a mine. Taking into consideration the condition of the mine at the time I was there and the price which was to be paid for it, George W. Crowe was certainly entitled to ten per cent. commission. I believe I have said all that I know about the matter.

Cross-examination:

Mr. Emerson Gee first called my attention to the Pride of the West mine. I was not present at the time Mr. Crowe and Mr. Chapin made an agreement as to — Mr. Crowe was to get in case he sold the mine. I did not hear the original agreement. An option was given to me during the time Mr. Crowe told me his option covered. The time of my option with Chapin and Neville expired and I renewed the option with the administrators of Chapin and Neville. Mr. Crowe's option was relinquished when I took an option on the mine. The first payment on the mine was made about April 1, 1900. The purchasers are not even yet bound to take the mine if they do not want it. When my option expired with Mr.
102 Chapin and Mr. Neville I made a deal with Henry Harmon on the following terms:

$10,000 cash;
$10,000 in three months;
$10,000 in six months;
$10,000 in nine months;
$10,000 in twelve months, and
$50,000 in eighteen months.

I cannot remember the exact words of the conversation in answer to the 21st interrogatory. In case the mine was sold, two-thirds of the ten per cent. commission was to go to myself and associates, and one-third to Mr. Geo. W. Crowe. I have had nothing whatever to do with the bringing of this suit and bearing no part of the expense, but, if I felt so disposed, believe I might claim a part of the commission if it was collected.

Q. Has not Mr. Wilfley also an interest in said commission in case Mr. Crowe recovers it?

A. I do not expect to get any of the commission.

I bought the mine one-half for myself, and other half for Mr. Emerson Gee and others. Mr. Crowe took myself and Gee to the mine the first time I ever saw it, and I understood from Mr. Gee that Mr. Crowe first called his attention to the mine. The deal with the administrators was made about the 1st of April, 1900. I do not remember just when Mr. Chapin and Mr. Neville died. Crowe had nothing to do with the sale after the death of Mr. Chapin.

Mr. Hereford offered in evidence a copy of the escrow agreement with the Consolidated National Bank of Tucson. It was
103 received in evidence and marked "Exhibit —."

Mr. Hereford offered in evidence an agreement made and entered into *the* on the 2d day of April, 1900, between M. M. Trickey administrator, and Henry Harmon, Administrator, with Arthur R. Wilfley. Same was received and marked "Exhibit —."

Mr. Hereford also offered in evidence a bond for a deed given by Henry Harmon, Administrator, to Arthur R. Wilfley, for one-fourth interest in the Pride of the West mine; same was received in evidence and marked "Exhibit —."

It was admitted by the parties that A. R. Wilfley paid to Henry Harmon, Administrator of the estate of Jerry Neville, deceased, under the said agreement for the purchase of one-fourth interest in the Pride of the West mine, the following sums, upon the dates set opposite the same:

April 7, 1900	$500.
June 19, 1900	4500.
September 19, 1900	5000.
December 19, 1900	5000.
March 20, 1901	5000.
June 17, 1901	5000.
and December 7, 1901	25000.

Mr. Hereford offered in evidence the original creditor's claim sworn to by Mr. Crowe. The same were received in evidence and marked "Exhibit —."

Plaintiff rested.

M. M. TRICKEY being called in behalf of defendant, testified as follows:

104 I am the administrator of the estate of Norman H. Chapin.

When I became administrator of the estate, I understood that the escrow agreement which is in evidence was in the Consolidated National Bank at Tucson. I cannot remember exactly what moneys Mr. Wilfley paid me as administrator on account of the Pride of the West mine and the dates when they were paid.

(Mr. Trickey was permitted to refresh his memory as to the dates and payments by reference to a memorandum which he had kept, and then continued, as follows:)

On April 7, 1900, I received $500; June 19, 1900, $4500; September 19, 1900, $5000; December 19, 1900, $5000; March 20, 1901, $5,000; June 17, 1901, $5000; December 7, 1901, $25000., making a total of fifty thousand dollars. I did not receive any other moneys from Mr. Wilfley that I remember of. I had no conversation or dealings with Mr. Crowe with respect to any agreement bonding or selling the Pride of the West mine to Mr. Wilfley; none whatever.

Q. Did you have any negotiations with anybody leading up to the contract which you executed with Mr. Wilfley?

(Mr. Hereford objected to this question as incompetent, immaterial and irrelevant.)

The COURT: You may ask the witness who participated in the negotiations leading up to the execution of this contract.

(Mr. Hereford excepted to the ruling of the court.)

Mr. Wilfley participated in the negotiations leading up
105 to this contract executed by the administrator. Also myself and Hr. Harmon in the other case. Nobody else.

Cross-examination:

Mr. Wilfley was in possession of the Pride of the West mine at the time I became administrator and has been in possession ever since. Mr. Wilfley and the company, have had possession right straight along. I knew as everybody knew, that they had an option to purchase the mine and was working it and a copy of the lease I found among the papers.

Redirect examination:

I said I found a copy of the lease in a drawer; where the original lease is—I suppose Mr. Wilfley has it; it is a copy of the lease drawn up by Mr. Wilfley's handwriting.

Recross examination:

By a lease I mean a lease on the mine. It was not a royalty with an option to purchase; it was just a common lease. I found it in a drawer. I wrote the Consolidated National Bank to send me the deed which was placed with them; that was a long time after I found the lease. The deed laid there a long time.

The court having rendered its decision in favor of the plaintiff for the full amount with interest, the defendant moved for a new trial in writing, and the said motion having been denied, the defendant excepted to the order denying the same. The court having filed its findings of fact and conclusions of law, the defendant
106 excepted to the 4th, 5th, 6th and 9th findings of fact, on the ground that there is not sufficient evidence to sustain the same or any part thereof. The defendant excepted to the 1st, 2d, 3d and 4th conclusions of law.

Respectfully submitted,

SMITH & IVES,
Attorneys for Defendant Appellant.

The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same day submitted to Messrs. Hereford & Hazzard, attorneys for the opposite party, who made no objections thereto; whereupon the said bill of exceptions is now by me signed, approved and allowed as of the said 24th day of January, 1902.

GEO. R. DAVIS,
Judge of the District Court of the First Judicial District, Territory of Arizona, in and for Santa Cruz County.

(Endorsed:) # 80. In the District Court, Santa Cruz Co., Arizona Territory. George W. Crowe, Plaintiff, *vs.* Henry Harmon, Administrator of the estate of Jerry Neville, Deceased, Defendant. Bill of Exceptions. Smith & Ives, Attorneys for Defendant, Tucson, Arizona. Filed May 12, 1902. S. F. Noon, Clerk. No. 790. In the Supreme Court of the Territory of Arizona. Henry Harmon, Adm'r, *vs.* Geo. W. Crowe. Bill of exceptions. Filed June 9, 1902. James Allen Cox, Clerk. By Angie B. Parker, deputy.

107 In the Supreme Court of the Territory of Arizona.

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
vs.
GEORGE W. CROWE, Appellee.

Appeal from the District Court of Santa Cruz County.

Hon. Geo. R. Davis, Judge.

Smith & Ives and Duffy & Richardson, Attorneys; Rochester Ford, of counsel, for Appellant.
Hereford & Hazzard, Attorneys for Appellee.

Opinion by Doan, Justice.

Upon the authority of the case of M. M. Trickey, Administrator of the estate of Norman H. Chapin, deceased, Appellant, *vs.* George W. Crowe, Appellee, decided by this Court, the judgment of the trial Court in this case is reversed, the case is remanded and judgment is directed to be entered in the lower Court for the defendant.

FLETCHER M. DOAN,
Associate Justice.

We concur:
EDWARD KENT, *C. J.*
RICHARD E. SLOAN, *A. J.*

(Endorsed:) No. 790. In the Supreme Court of the Territory of Arizona. Henry Harmon, Adm'r, *vs.* George W. Crowe. Opinion by Doan, J. Recorded Book 5, page 294. Filed March 20, 1903. S. M. Cullen, Clerk.

108 In the Supreme Court of the Territory of Arizona.

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

vs.

GEORGE W. CROWE, Appellee.

The appellee petitions this honorable court to grant a rehearing in the above entitled cause, and respectfully submits that the court in its opinion and decision erred upon the following points, to-wit:

First. In considering or determining the case upon questions of fact, by reason of the fact that the Bill of Exceptions in the case fails to state that it contains all of the evidence given in the case, or upon the points presented to this honorable court, for its decision.

Second. In considering or determining the case upon any questions of fact by reason of the fact that the Bill of Exceptions in the case fails to state, and the record fails to show that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision of this honorable court.

Third. In holding that there was no evidence in said cases to sustain certain findings of the lower court referred to in the decision of this court; And in holding that there was not

109 sufficient evidence to sustain the findings of the lower court. for the reason that the bill of exceptions does not purport to contain all the evidence given to sustain all of said findings.

Fourth. In determining the case upon any questions of fact, by reason of the fact that the bill of exceptions does not purport to contain all the evidence given in the lower court.

Fifth. In holding that the evidence contained in the record in this case is not sufficient to sustain the findings of the lower court.

Sixth. In holding that the contracts sued upon by appellee Crow-, was terminated by the death of N. H. Chapin.

Seventh. In holding that the different options or agreements under which the mines were admitted to be sold, were separate and distinct transactions each taking place at the termination of the other.

Eighth. In holding that the contract under which the mines were ultimately sold was not an extension of the original contract made with Chapin.

Ninth. In not holding that appellee's contract with Chapin was for services already fully performed, the benefit of which Chapin's estate received; and that in consequence Chapin's estate was indebted to appellee for the amount for which judgment was rendered in the lower court.

Respectfully submitted,

HEREFORD & HAZZARD,
Att'ys for Appellee.

110 (Endorsed:) No. 790. In the Supreme Court, Ter. of Arizona. Henry Harmon, Adm'r, &c., Appellant, *vs.* Geo. W. Crowe, Appellee. Petition for rehearing. Filed this 2nd day of April, 1903. S. M. Cullom, Clerk. Service admitted this 2nd day of April, 1903, Smith & Ives by S. W. P., Attorneys for Appellant.

111 In the Supreme Court of the Territory of Arizona.

GEORGE W. CROWE, Plaintiff and Appellee,
vs.
HENRY HARMON, as Administrator, &c., Defendant and Appellant.

Bill of Costs.

To appearance fee paid Clerk of the Supreme Court,.....	$20.00
To printing abstract of testimony and brief,.....	$64.00
Total, ...	$84.00

TERRITORY OF ARIZONA, *County of Pima, ss:*

Eugene S. Ives, being duly sworn says: that he is one of the attorneys for the defendant-appellant in the above entitled action, and that the foregoing bill of costs is correct to his own knowledge.

EUGENE S. IVES.

Sworn to before me this 28th day of May, 1903.

GRACE E. THORNE,
[SEAL.] *Notary Public.*

My commission expires Feb. 6, 1907.

(Endorsed:) No. 790. Supreme Court, Arizona Ter. George W. Crowe, Plaintiff-Appellee, *vs.* Henry Harmon, as administrator, etc., Defendant-Appellant. Bill of costs. Filed May 29, 1903. S. M. Cullom, Clerk. Service of the within Bill of costs is admitted this 28" day of May, 1903. Hereford & Hazzard, att'y- for Pl'ff.

112 In the Supreme Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
v.
GEORGE W. CROWE, Appellee.

The above named appellee, conceiving himself ag-rieved by the decree made and entered on the 20th day of March, 1903, in the above entitled case, does hereby appeal from said order and decree to the Supreme Court of the United States, for reasons specified in the assignment of errors which is filed herewith and prays that this appeal may be allowed and that a transcript of the record, proceed-

ings and papers which said decree was made, duly authenticated, may be sent to the supreme court of the United States.

HEREFORD & HAZZARD,
Attorneys for Appellant.

Dated M'ch 15, 1905.

The foregoing claim for appeal is allowed.

FLETCHER M. DOAN,
Associate Justice, Supreme Court of Arizona.

Dated March 15, 1905.

(Endorsed:) No. 790. In the Supreme Court, Territory of Arizona. Henry Harmon, Plaintiff, *vs.* Geo. W. Crowe, Defendant. Appeal. Filed this 15th day of March, 1905. S. M. Cullom, Clerk. Hereford & Hazz[illegible] torneys for Appellee.

113 In the S[illegible]e Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
v.
GEORGE W. CROWE, Appellee.

Know all men by these presents: That we, George W. Crowe, as principal, and The Title Guaranty and Trust Company of Scranton, Penn., as sureties, are held and firmly bound unto Henry Harmon, administrator of the estate of Jerry Neville, deceased, in the full and just sum of one thousand dollars ($1000.00) to be paid to the said Harmon, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1905.

Whereas, lately at a session of the supreme court of the territory of Arizona, on the 20th day of March, 1903, in a suit pending in said court between Henry Harmon, administrator of the estate of Jerry Neville, deceased, appellant, and George W. Crowe, appellee, a judgment and decree was rendered against the said George W. Crowe, and the said George W. Crowe, having obtained an appeal
114 and filed a copy thereof in the Clerk's office of the said court, to reverse the judgment and decree in the aforesaid court, and a citation directed to the said Harmon, administrator, admonishing him to be and appear at a session of the supreme court of the United States to be holden at the city of Washington on the 15th day of May, next.

Now, the condition of this obligation is such that if the said George W. Crowe shall prosecute his appeal to effect and answer all damages

and costs if he fail to make his appeal and plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE W. CROWE.

[SEAL.] THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNA.,

By SETH E. HAZZARD, AND FRANK W. DOAN.

Approved by

FLETCHER M. DOAN,

Associate Justice of the Supreme Court of Arizona.

Dated March 15th, 1905.

(Endorsed:) No. 790. In the Supreme Court, Territory of Arizona. Henry Harmon, Plaintiff, *vs.* Geo. W. Crowe, Defendant. Bond. Filed this 15th day of March, 1905, S. M. Cullom, Clerk. Hereford & Hazzard, attorneys for Appellee.

115 In the Supreme Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

v.

GEORGE W. CROWE, Appellee.

The appellee herein prays an appeal from the final decree of this court, to the supreme court of the United States, and assign for error—

I.

That the court erred in considering or determining the case upon questions of fact, by reason of the fact that the bill of exceptions in the case fails to state that it contains all of the evidence given in the case, or upon the points presented to this honorable court for its decision.

II.

That the court erred in considering or determining the case upon any questions of fact by reason of the fact that the bill of exceptions in the case fails to state, and the record to show that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision of this Honorable Court.

III.

That the court erred in holding that there was no evidence
116 in said case to sustain certain findings of the lower court referred to in the decision of this court; and in holding that there was not sufficient evidence to sustain the findings of the lower court, for the reason that the bill of exceptions does not purport to contain all the evidence to sustain all of said findings.

IV.

That the court erred in determining the case upon any questions of fact, by reason of the fact that the bill of exceptions does not purport to contain all the evidence given in the lower court.

V.

That the court erred in holding that the evidence contained in the record in this case is not sufficient to sustain the findings of the court below.

VI.

That the court erred in holding that the contract sued upon by appellee Crowe, was terminated by the death of Jerry Neville.

VII.

That the court erred in holding that the different options or agreements under which the mines were admitted to be sold, were separate and distinct transactions each taking place at the termination of the other.

VIII.

That the court erred in holding that the contract under which the mines were ultimately sold was not an extension of the
117 original contract made with Neville.

IX.

That the court erred in not holding that appellee's contract with Neville was for services aready fully performed, the benefit of which Neville's estate received; and that in consequence Neville's estate was indebted to appellee for the amount for which judgment was rendered in the lower court.

HEREFORD & HAZZARD,
Attorneys for Appellee.

(Endorsed:) No. 790. In the Supreme Court, Territory of Arizona. Henry Harmon, &c., Plaintiff, *vs.* Geo. W. Crowe, Defendant. Assignment of errors. Filed this 15th day of March, 1905, S. M. Cullom, Clerk.

118 In the Supreme Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
vs.
GEORGE W. CROWE, Appellee.

Findings of Fact.

In the above entitled action, the Supreme Court finds the facts to be as follows:—

I.

Previous to March, 1899, a mine known as the Pride of the West Mine was owned by three parties. A man named Olsen owned one-half thereof, and Norman H. Chapin, the defendant's intestate, and Jerry Neville each owned one-fourth interest therein.

In March, 1899, the plaintiff Crowe brought this mine to the attention of one Emerson Gee and his associate A. R. Wilfley. Subsequently, in the latter part of March, 1899, Wilfley purchased Olsen's one-half interest, and made an agreement with Chapin and Neville in pursuance whereof a deed to the remaining one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of $100,000 in cash, on or before the last day of April, 1900.

II.

It was verbally agreed between Crowe on the one part, and
119 Chapin on the other, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money receceived by him for their interest in the mine, as commission for making the sale. Such deed and escrow agreement were executed by Chapin and Neville on the 1st day of April, 1899.

III.

Prior to the 1st day of April, 1900, Chapin and Neville both died. M. M. Trickey was appointed administrator of Chapin's estate and Henry H. Harmon was appointed administrator of Jerry Neville's estate.

Wilfley failed to pay the money and take the property under his option, and after the 1st day of April, 1900, at the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey the administrator of Chapin's estate.

IV.

Thereafter, and on the 7th day of April, 1900, upon the payment of $1,000 by Wilfley, the administrators of these two estates made another agreement with Wilfley, by the terms of which they agreed to execute a deed to a one-half interest owned by the two estates, upon the payment of the purchase price of $100,000, in specific amounts, on different dates therein expressed. This option also lapsed.

V.

After said lapse, and on the 19" day of June, 1900, M. M.
120 Trickey, as administrator of the estate of Chapin, entered into another agreement, which was offered in evidence by the plaintiff, and appears in the bill of exceptions as "Exhibit 3."

By this agreement, Trickey as administrator, gave to Wilfley an option to purchase the one-fourth interest in the mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of

$5,000. in cash,
$5,000. within three months; the further sum of
$5,000. within six months; the further sum of
$5,000. within nine months; the further sum of
$5,000. within twelve months; and the further sum of
$25,000. within eighteen months.

The plaintiff Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Chapin.

VI.

In pursuance to this option, Wilfley paid to Trickey the sum of $5,000. in cash on the 19th day of June, 1900; and the following sums on the following dates, respectively:

$5,000. on September 19, 1900,
$5,000. on December 19, 1900,
$5,000. on March 20, 1901,
$5,000. on June 17, 1901,
$25,000. on December 7, 1901.

VII.

The above mentioned agreement (Exhibit 3) was only an option to purchase, and under it there was no obligation on the part of Wilfley to pay any portion of the purchase price, and no obligation on the part of Trickey to deliver the deed mentioned in the
121 agreement until the last payment of $25,000. in December, 1901, had been made.

VIII.

On the 10" day of December, 1900, Crowe presented to Trickey as administrator of Chapin's estate, in accordance with the law of the Territory of Arizona, his claim against the estate of Chapin for

"Ten per cent. of the purchase price of the Pride of the West Mine, agreement for the sale of which was entered into about April 1st, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive ten per cent commission upon said purchase price from said Chapin and Neville, one-half of said ten per cent being $5,000."

IX.

This claim was rejected by the administrator, and he thereupon brought this action in the District Court of Santa Cruz County on the 25" day of January, 1901, at which time the estate of N. H. Chapin, deceased, was solvent, and amply able to pay all debts of the said estate, and the said Chapin not the said Trickey nor any one else had paid to the plaintiff the said sum of $5,000. or any part thereof, or anything on account thereof.

The case was tried before the Court, without a jury, a jury having been by agreement of parties, waived, and the Court made the following findings of fact:—

122 I.

The plaintiff and defendants are both residents of the county of Santa Cruz, Territory of Arizona.

II.

That on or about the 11th day of January, 1900, Norman H. Chapin died in the said county of Santa Cruz, Territory of Arizona, intestate, and at the time of his death, the said Norman H. Chapin was a resident of the said county of Santa Cruz.

III.

That on the 8th day of February, 1900, the defendant, M. M. Trickey, received letters of administration upon the estate of the said Norman H. Chapin, from the Probate Court of the County of Santa Cruz; that the said defendant thereupon qualified as such administrator and entered upon the discharge of his duties, and that said letters of administration have not been revoked.

IV.

That between the 8th day of February, 1898, and the 3d day of January, 1900, the plaintiff performed services for the said Jerry Neville, at the request of the said Neville, in bringing about a sale of the interests of the said Neville in the Pride of the West mine, which mine is located in the said county of Santa Cruz, that the particular nature of said services was the finding and procuring of a purchaser, and bringing about a sale of the interests of the said Neville in the said Pride of the West mine; that the purchaser
123 so found and procured by plaintiff was A. R. Wilfley, of Denver, Colorado; for which services the said Neville agreed

to pay to said plaintiff 10% of all moneys received by the said Neville, from the said Wilfley on account of the sale by the said Neville, and the purchase by the said Wilfley, of the said mine. That one Norman H. Chapin was the agent of the said Jerry Neville in making the contract with this plaintiff under which this plaintiff acted, and which contract provided for the payments to this plaintiff of the said ten per cent for plaintiff's services.

V.

That the said A. R. Wilfley paid to the said defendant, as such administrator, for the interest of the said Neville, the sum of Fifty Thousand Dollars ($50,000.), as follows: April 7, 1900, $500.00; June 19, 1900, 4,500.00; September 19, 1900, 5,000.00; December 19, 1900, 5,000.00; March 20, 1901, 5,000.00; June 17, 1901, 5,000.00; December 7, 1901, 25,000.00. That this plaintiff was and is entitled to the sum of five thousand dollars ($5,000.) being 10% of the said $50,000., for his services in bringing about the sale of the interest of the estate of the said Jerry Neville, in said mine.

VI.

That shortly after the appointment of the said Henry Harmon as administrator of the estate of Jerry Neville, deceased, the said administrator published a notice to the creditors of the said Neville, requiring all persons having claims against the said estate,
124 to exhibit them with the necessary vouchers to the said administrator; that on or about the 10th day of November, 1900, and within the time after the first publication of said notice allowed by law and by the said notice, the claim of this plaintiff for the sum of five thousand dollars ($5,000.) for services performed for the said Neville in bringing about the sale of the interest of the said Neville in the Pride of the West mine, verified in the manner required by law, and by the oath of this plaintiff, was duly presented in writing by the plaintiff to the defendant as much administrator, for allowance: That the said claim was by the said defendant, as such administrator, on or about the 20th day of November, 1900, rejected.

VII.

That the estate of the said Jerry Neville, deceased, is solvent, and amply able to pay all the debts of the said estate.

VIII.

That neither the said Jerry Neville, nor the said defendant, nor anyone else, has paid to the said plaintiff, the said sum of $5,000. or any part thereof, or anything on account thereof.

IX.

That all the allegations and averments of the plaintiff's complaint are true; and that all the denials and allegations of the defendant's answer are untrue.

From the foregoing findings of fact, the court concluded as a matter of law:

125 I.

That the said defendant as administrator of the estate of Jerry Neville, deceased, is and was on the 10th day of November, 1900, indebted to the plaintiff herein in the sum of five thousand dollars ($5,000.) payable at the times and in the amounts set forth below.

II.

That plaintiff herein is entitled to a judgment against the defendant, as such administrator, for the sum of five thousand dollars ($5,000.) with interest thereon as follows: On $1,000. thereof from the 10th day of November, 1900, to the first day of September, 1901, at the rate of 7% per annum; on $500. thereof from the 19th day of December, 1900, to the 1st day of September, 1901, at the rate of 7% per annum; on $500. thereof at the rate of 7% per annum, from the 20th day of March, 1901, to the 1st day of September, 1901; on $500. thereof from the 17th day of June, 1901, to the 1st day of September, 1901, at the rate of 7% per annum, and interest on the full sum of $2500. from the 1st day of September, 1901, until paid, at the rate of 6% per annum. Also interest on the remaining $2500. of said judgment from the 7th day of December, 1901, until paid at the rate of 6% per annum.

III.

That plaintiff is entitled to a judgment against the defendant herein as such administrator, for plaintiff's costs herein expended.

126 IV.

That the said sums of five thousand dollars ($5,000.) with interest, and the costs herein, should be paid to the plaintiff by the said defendant as such administrator, in the due course of his administration of said estate.

Dated: January 10th, 1902.

GEO. R. DAVIS, *Judge.*"

Upon these findings of fact and conclusions of law, the Court rendered judgement in favor of the plaintiff for $5319.50, together with interest thereon from date until paid, at the rate of six per cent. per annum, together with plaintiff's costs and disbursements incurred in the action, and directed the defendant to pay the said sum out of the estate of Chapin in due course of the administration of said estate.

From this judgment, and the denial of a motion for a new trial, the defendant appealed to the Supreme Court of the Territory of Arizona.

The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all

of the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the
127 record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona. The abstract of the transcript which contained the evidence stated that "the defendant by his bill of exceptions, which contained all the evidence taken on said trial, and which is as follows:" then follows the bill of exceptions reciting the testimony of the different witnesses, covering some 23 pages, and at the conclusion thereof, the following allowance:

"The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same date submitted to Messrs. Hereford & Hazzard, attorneys for the opposite party, who made no objection thereto, whereupon the said bill of exceptions is now by me signed, approved and allowed as of the said 24th day of January, 1902. Geo. R. Davis, Judge," but the record contains no certificate from the Clerk or Court that the evidence in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee.

The Arizona Supreme Court found the following facts:

I.

That the efforts of the plaintiff Crowe resulted in procuring the purchaser Wilfley not to purchase absolutely, but to take an option on the purchase of the property involved, for one hundred thousand dollars; that Crowe's principals executed a deed to the prop-
128 erty and placed it in escrow; that although Neville died before the expiration of that escrow agreement, the deed executed by him remained subject to the order of the purchaser and that if he had availed himself of the terms of that agreement, the sale would have been completed and plaintiff Crowe would have been entitled to his commission, but that Wilfley failed to make the payment and take up the deed and, after the expiration of the option and after Neville's death, the deed was returned to the administrator of Neville's estate and the transaction was closed without any sale having been made.

II.

That the sale of the property that was subsequently affected was the result of the negotiations between Harmon, the administrator of Neville's estate, and Wilfley; that before the date of the sale, Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Neville.

III.

That in regard to the latter negotiations, Crowe rendered no services to Harmon, received no appointment or agreement from Harmon in reference to the matter, and took no part whatever in the ultimate sale.

IV.

That the plaintiff Crowe did not, between the 8th day of February, 1898, and the 3d day of January, 1900, bring about a sale of Neville's interest in the property in controversy.

129 V.

The said A. R. Wilfley paid to the said defendant, the sum of fifty thousand dollars, as follows. April 7, 1900, five hundred dollars; June 19, 1900, four thousand five hundred dollars; September 19, 1900, five thousand dollars; December 19, 1900, five thousand dollars; March 20, 1901, five thousand dollars; June 17, 1901, five thousand dollars; December 7, 1901, twenty-five thousand dollars, not for the right, title and interest of the said Jerry Neville, but for the "right, title and interest of the said estate of Jerry Neville, deceased, in and to" the said property, in compliance with the terms of the contract of sale and title bond executed to the said Wilfley by Harmon, the administrator of said estate.

The Arizona Supreme Court concludes, as a matter of law:

I.

That the trial court erred in finding as a fact that plaintiff Crowe "between the 8th day of February, 1898, and the 3d day of January, 1900, brought about a sale of Neville's interest in the mine," because there was no evidence to sustain such finding.

II.

That said court erred in finding as a fact that the said A. R. Wilfley paid to the said defendant, as such administrator, for the interest of the said Neville, the sum of fifty thousand dollars ($50,000.) as follows: April 7, 1900, $500.00; June 19,
130 1900, 4,500.00; September 19, 1900, 5,000.00; December 19, 1900, 5,000.00; March 20, 1901, 5,000.00; June 17, 1901, 5,000.00; December 7, 1901, 25,000.00, because there was no evidence to sustain such finding.

III.

That plaintiff Crowe had no right to any commissions under the sale as finally made.

IV.

That after the death of Neville revoked the agency of plaintiff Crowe, plaintiff had no further right or interest in said property, or the proceeds of the sale thereof, by virtue of the agreement of March, 1899, entered into between plaintiff and Neville.

V.

That the action of the trial court in rendering judgment in favor of the plaintiff Crowe was erroneous and should be reversed.

In accordance therewith, the judgment of the lower court was reversed, the case remanded and judgment directed to be entered in the lower court for the defendant.

Theraftr a petition for a rehearing was submitted by the plaintiff Crowe, as appears in the records of this case, which petition for rehearing was denied, and the plaintiff Crowe appealed.

FLETCHER M. DOAN,
Associate Justice.

131 (Endorsed:) No. 790. In the Supreme Court of the Territory of Arizona. Henry Harmon, Adm'r, *vs.* George W. Crowe. Findings of fact. Filed May 10th, 1905. S. M. Cullom, Clerk.

132 In the Supreme Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
vs.
GEORGE W. CROWE, Appellee.

Stipulation.

It is hereby stipulated and agreed by and on behalf of Henry Harmon, administrator of the estate of Jerry Neville, deceased, that George W. Crowe, appellee, may have sixty days from the date hereof within which to docket this case, and file the record thereof with the Clerk of the Supreme Court of the United States, and that the said case when so docketed, and the record when so filed, shall be of the same force and effect as if the said case had been docketed, and the record thereof filed with the Clerk of the Supreme Court of the United States, within sixty days from the 15th day of March, 1905, that being the date on which the appeal herein was allowed, the appellant waiving no irregularity other than the extension hereby granted.

Dated May 9, 1905.

EG. S. IVES,
Attorney for Appelant Harmon.

(Endorsed:) No. 790. In the Supreme Court, Territory of Arizona. Henry Harmon, Admr. Appellant, *vs.* Geo. W. Crowe, Appellee. Stipulation extending time. Filed this 12th day of May, 1905. S. M. Cullom, Clerk. Hereford & Hazzard Attorneys for Geo. W. Crowe, Appellee.

133 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 31st day of October, A. D., 1902, the same being one of the regular juridical days of the October Term, A. D., 1902, of said Court, the following order, *inter alia,* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
vs.
GEORGE W. CROWE, Appellee.

In this cause it is ordered that the Appellant have twenty days from this day, in which to file brief.

It is further ordered that Appellee have twenty days thereafter to file his brief, and

It is further ordered that Appellant be granted ten days after the filing of Appellee's brief in which to file his reply brief.

And afterwards and upon to-wit the 13th day of January, A. D. 1903, the same being one of the regular juridical days of the January Term A. D., 1903, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

134 No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
vs.
GEORGE W. CROWE, Appellee.

On motion of J. L. B. Alexander, Esq., for Smith & Ives, Attorneys for Appellant herein, it is ordered that the hearing of this cause be set for January 21, 1903.

And afterwards and upon to-wit the 21st day of January, A. D., 1903, the same being one of the regular juridical days of the January Term A. D., 1903, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 790.

HENRY HARMON, Adm'r, Appellant,
vs.
GEO. W. CROWE, Appellee.

This cause coming on for hearing, was argued by Eugene S. Ives, Esq., for appellant, and Frank H. Hereford Esq., for appellee, and cause ordered submitted.

And afterwards and upon to-wit the 20th day of March, A. D., 1903, the same being one of the regular juridical days of the January Term A. D., 1903, of said Court, the following order,
135 *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

vs.

GEORGE W. CROWE, Appellee.

This cause having been heretofore submitted and by the Court taken under consideration and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the trial court be and the same is hereby reversed, the case remanded, and judgment is directed to be entered in the lower court for the defendant.

It is further ordered, adjudged and decreed that the appellant herein, do have and recover of and from George W. Crowe, appellee herein, his costs in this court, taxed at eighty-four ($84.00) dollars, together with his costs in the lower court in this cause incurred.

And afterwards and upon to-wit the 23rd day of May, A. D., 1903, the same being one of the regular juridical days of the January Term, A. D., 1903, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

136

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

vs.

GEO. W. CROWE, Appellee.

It is ordered that the motion for re-hearing filed herein by Appellee, be submitted.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

vs.

GEO. W. CROWE, Appellee.

It is ordered that the motion for re-hearing filed herein by Appellee, and heretofore submitted, be and the same is hereby denied.

And afterwards and upon to-wit the 15th day of March, A. D. 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

137 No. 790.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,

vs.

GEORGE W. CROWE, Appellee.

On motion of Mr. E. S. Ives, attorney for appellant herein, it is ordered that Mr. Frank W. Doan may appear in this cause for attorneys for appellee.

Comes now Mr. Frank W. Doan, for appellee herein, in open court, and gives notice of appeal from the judgment of this court, to the Supreme Court of the United States, and moves the Court that the appeal be allowed.

It is ordered that said motion be granted, and the appeal be and the same is hereby allowed.

It is further ordered that the amount of the Bond on Appeal be fixed by the Justice who signs the Citation.

138 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 137, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry Harmon, Administrator of the Estate of Jerry Neville, deceased, against George W. Crowe, Appellee, as the same remain of record and on file in said office.

I further certify that the citation attached hereunto, is the original Citation issued by said Supreme Court of the Territory of Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona this 10 day of June, 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

139 In the Supreme Court of the Territory of Arizona.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant,
v.
GEORGE W. CROWE, Appellee.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Henry Harmon, Administrator of the Estate of Jerry Neville, Deceased, Greeting:

You are hereby cited to be and appear at a session of the supreme court of the United States at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed by the supreme court of the territory of Arizona, filed in the clerk's office of said court, on the 15th day of March, 1905, in a case wherein Henry Harmon, administrator of the estate of Jerry Neville, deceased, is appellant, and George W. Crowe, is appellee, to show cause, if any, why the decree rendered against the said appellee as in his said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Fletcher M. Doan, associate justice of the supreme court of the territory of Arizona, this 15th day of March, 1905.

FLETCHER M. DOAN,
Associate Justice Supreme Court of Arizona.

140 [Endorsed:] No. 790. In the Supreme Court, Territory of Arizona. Henry Harmon, Plaintiff, *vs.* Geo. W. Crowe, Defendant. Citation. Filed this 15th day of March, 1905. S. M. Cullom, Clerk. Hereford & Hazzard Attorneys for Appellee.

Endorsed on cover: File No. 19,827. Arizona Territory supreme court. Term No. 325. George W. Crowe, appellant, *vs.* Henry Harmon, administrator of the estate of Jerry Neville, deceased. Filed July 5th, 1905. File No. 19,827.

FILED
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No. 90.

W. C. KEEGIN,
Attorney for Appellant.

F. H. HEREFORD,
S. B. HAZZARD,
Of Counsel.

IN THE

Supreme Court of the United States

GEORGE W. CROWE, Appellant,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, deceased, Appellee.

No. 70. October Term, 1906.

BRIEF FOR APPELLANT.

Statement of the Case.

The statement of facts found by the Supreme Court of the Territory of Arizona, for use on the appeal to this court, is found on pages 58 to 65 of the Transcript of Record. It is quite full and a synopsis of it will no doubt be sufficient for the purpose of arguing the assignments of error relied upon in this appeal. The case is in essential respects identical with Crowe vs. Trickey, Admr., No. 71, of the present term of this court.

From the statement of facts prepared by the Supreme Court of Arizona, it appears that on January 25, 1901, the appellant, George W. Crowe, brought suit in debt against the appellee, Henry Harmon, as administrator of the estate of Jerry Neville, deceased, in the District Court of Santa

Cruz County, Arizona Territory; that the case was tried before the court without a jury, a jury having been waived by an agreement of parties; that, after the trial, the District Court made and filed findings of fact and conclusions of law, which sustained all of the allegations of appellant Crowe's complaint; that judgment was, on January 10, 1902, accordingly entered in favor of appellant Crowe, for the sum of five thousand, three hundred and nineteen dollars and fifty cents ($5,319.50); that from this judgment and a denial of a motion for a new trial, appellee appealed to the Supreme Court of the Territory of Arizona; that the only statements of fact in the record on appeal to the Supreme Court of Arizona were the findings of fact of the District Court, and a bill of exceptions prepared on behalf of appellee, Harmon, herein; that this bill of exceptions "did not state that it contained all the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision; nor does it otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before said Supreme Court of Arizona." That the Supreme Court of Arizona reviewed the case upon the evidence in the record, found new facts which were the reverse of some of the facts found by the District Court, reversed the case, and ordered that it be remanded, with instructions to the District Court to enter a judgment for appellee, Harmon; that appellant, Crowe, asked for a rehearing, which was denied. And it appears from the record in this case that appellant Crowe then brought the case to this court on appeal.

Appellant herein made nine assignments of error, which are contained in the printed Transcript of Record, at pages 56 and 57. The first four of these are based upon the action of the Supreme Court of Arizona in reviewing the evidence in the case, finding new facts and determining the

case upon these facts, when there was nothing in the record to show that all of the facts were before it. The last five errors assigned directly attack those findings of the Supreme Court of Arizona that hold that there was either a lack of evidence or insufficient evidence to sustain the findings of the District Court. The following are the

Assignments of Error.

"1. That the court erred in considering or determining the case upon questions of fact, by reason of the fact that the bill of exceptions in the case fails to state that it contains all of the evidence given in the case, or upon the points presented to this honorable court for its decision.

"2. That the court erred in considering or determining the case upon any questions of fact by reason of the fact that the bill of exceptions in the case fails to state, and the record to show, that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision of this honorable court.

"3. That the court erred in holding that there was no evidence in said case to sustain certain findings of the lower court referred to in the decision of this court; and in holding that there was not sufficient evidence to sustain the findings of the lower court, for the reason that the bill of exceptions does not purport to contain all the evidence to sustain all of said findings.

"4. That the court erred in determining the case upon any questions of fact, by reason of the fact that the bill of exceptions does not purport to contain all the evidence given in the lower court.

"5. That the court erred in holding that the evidence contained in the record in this case is not sufficient to sustain the findings of the court below.

"6. That the court erred in holding that the contract sued upon by appellee Crowe, was terminated by the death of Jerry Neville.

"7. That the court erred in holding that the different options or agreements under which the mines were admit-

ted to be sold, were separate and distinct transactions each taking place at the termination of the other.

"8. That the court erred in holding that the contract under which the mines were ultimately sold was not an extension of the original contract made with Neville.

"9. That the court erred in not holding that appellee's contract with Neville was for services already fully performed, the benefit of which Neville's estate received; and that in consequence Neville's estate was indebted to appellee for the amount for which judgment was rendered in the lower court."

Argument.

The first four assignments of error herein set out could probably have been consolidated into one, and for that reason we will discuss them together, and not separately.

The finding of the Supreme Court of Arizona is conclusive of the fact that none of the evidence given at the trial of the case in the District Court was preserved and carried to the Supreme Court of Arizona, except that contained in the bill of exceptions. The finding of the Supreme Court of Arizona is also conclusive of the fact that this bill of exceptions did not state that it contained all of the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Supreme Court of Arizona for its decision. The finding of the Supreme Court of Arizona is also conclusive of the fact that it does not "otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court, was before the said Supreme Court of Arizona."

Transcript of Record, pages 62-63.

The Supreme Court of Arizona erred in reviewing the case upon the evidence, and reversing the judgment, in the absence of a showing that all of the evidence in the case was before it.

> "In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we can not presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did."

U. S. vs. Copper Queen Consolidated Mining Co., 185 U. S., 495; 46 Law Ed., p. 1008.
Russell vs. Ely, 2d Black, 575, L. Ed., Vol. 17, p. 258.
Gardner, Treasurer, vs. Babcock, 3d Wallace, 220; L. Ed., Vol. 8, p. 31.
Texas Pacific R. Co. vs. Cox, 145 U. S., 593; L. Ed., Vol. 36, p. 829.

Statements of fact must affirmatively show that they contain all the evidence, and bills of exception must likewise show that they contain all the evidence necessary to determine the point in controversy

> "In short, every matter not otherwise made, by statute, a matter of record, must be made so by a statement of facts or bill of exceptions, if we are required to review such matter."

Putnam vs. Putnam, 3 Arizona, 182; reported in Vol. 24, Pacific Reporter, page 320, as Southerland vs. Putnam.

> "If the paper is to be considered as a statement of facts, it should state that it contains all the facts admitted, and the evidence admitted to have been

proven, and the evidence of the facts disputed. No such statement is contained therein. We conclude this is not good as a statement of fact."

Territory vs. Flores, 3 Ariz., page 215; 77 Pacific, 491.

This last case considers a document to ascertain whether or not it is a bill of exceptions or statement of facts, or either. These rules of law are recognized in other Arizona decisions, noticeably Paul vs. Cullon, Second Arizona, p. 16; 8 Pacific, p. 187; Evans vs. Glenecross, 4 Ariz., 222; 36 Pacific, 212.

The Statutes of Arizona provide that the evidence taken in the trial of a case may be made a part of the record by a statement of fact or by bill of exceptions, and further provide that:

"The bill of exceptions may contain all the evidence, or so much thereof as may be necessary to explain the exceptions, and if all the evidence, or sufficient thereof to explain the exceptions, is contained in the bill of exceptions, no statement of fact shall be necessary."

Statutes of Arizona, year 1901, page 458, Par. 1460.
Statutes of Arizona, year 1901, page 458, Par. 1459.

The converse is, no doubt true that a statement of fact shall be necessary in case the bill of exceptions does not contain all the evidence, or sufficient thereof to explain the exceptions.

Where the bill of exceptions does not purport to give all the evidence, the proof will have been presumed to have been supplied unless the error is affirmatively shown.

Evans vs. Glenecross, *supra*, 4th Ariz., 222.

"When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence."

Paul vs. Cullom, *supra*, Second Arizona, p. 16.
Territory vs. Clanton, 3 Ariz., p. 1; 20 Pacific, p. 94.

"As the applicant, however, has omitted to preserve the evidence in this regard, and as it is not before us, we must assume in any event that this evidence was sufficient to sustain the finding of the court that a proper location notice has been duly filed and recorded."

Score vs. Griffin (Ariz.), 80 Pacific, p. 331.

"Where the record does not affirmatively purport to contain all the evidence, a state of facts will be presumed proved in the trial court authorizing the rulings, verdict and judgment."

Ency. Pleading and Practice, Vol. 2, p. 141.

This quotation from the Encyclopedia of Pleading and Practice cites, in its support, from one to twenty-five cases in each of the following States: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, and Wisconsin.

"The findings of fact by the trial court are presumptively correct, and if the record on appeal does not contain all the evidence, the appellate court will

not review them. It will be presumed that sufficient evidence to support the findings was legally admitted."

Ency. Pleading and Practice, Vol. 2, page 486.

This quotation from the Ency. of Pleading and Practice cites, in support of it, from one to thirty cases from the following States: Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Washington and Wisconsin.

"Where the evidence is not all in the record, its sufficiency can not be reviewed."

American Digest, Century Edition, Vol. 3, Col. 680, Sec. 2911, citing from one to fifty or more cases from the States of Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin.

"The sufficiency of the evidence can not be considered on appeal where the record does not affirmatively show that it contains all the evidence."

American Digest, Century Edition, Vol. 3, Col. 702, Sec. 2916.

This quotation from the American Digest citing from one to fifty or more cases from Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, Ohio, Oregon, South Dakota, Tennessee, West Virginia and Wisconsin.

Texas Pacific R. Co. vs. Cox, *supra*, 145 U. S., 593; 36 L. Ed., 829.
Hansen vs. Boyd, 161 U. S., 397; 40 L. Ed., 747.
Elliott's Appellate Procedure, pages 773-4, Section 823.

This refusal of courts to review the findings of the lower court unless the record affirmatively shows that it contains all the evidence in the case, or all of the evidence bearing upon the findings, is so well established, and upon such sound reasoning that it can not be presumed that a court of the standing and dignity of the Supreme Court of the Territory of Arizona would disregard it. We feel confident that the Supreme Court of the Territory of Arizona did not intend to disregard it, but was misled into the belief that the record did affirmatively show that it contained all the evidence bearing upon the findings.

We think that part of the findings of the Arizona Supreme Court were intended to show that the said court had, when rendering its decision, been erroneously led into the belief that the bill of exceptions contained all the evidence, and that when two years after it was too late to correct its judgment, it discovered its error, and framed a finding to set forth the fact that its action was caused by a statement which it quotes, and which was contained in a paper that was not a record of the court

but which pretended to be an *ex parte* transcript of the record. The Supreme Court of Arizona, using language that could not be misunderstood, finds as a fact that:

> "The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona."

The court, continuing this finding, then finds that: "The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions which contained all the evidence taken on said trial, and which is as follows': then follows the bill of exceptions, reciting the testimony of the different witnesses, covering some twenty-three pages," etc.

Transcript of Record, page 63.

These latter facts thus found by the Arizona Supreme Court could under no circumstances have a place in this record unless they were introduced as an explanation for the reason the court erred in reviewing the findings of the lower court.

The title "Abstract of the Transcript" is a misnomer. There is no such name for a document on appeal contained in the laws of Arizona, or the rules of its Supreme

Court, but the rules of its Supreme Court provide for an "Abstract of Record."

> Rules of the Supreme Court of Arizona, approved March 20, 1903 (71 Pacific, VI).

The previous rules of the Arizona Supreme Court had also provided for an "Abstract of Record," and the document thus provided for is frequently called an Abstract of the Transcript. It is a document prepared by the attorney for the appellant, for the convenience of himself and the Supreme Court, and its contents have no more binding force upon the court or opposite counsel than any statement contained in the counsels' briefs.

> Rules of the Supreme Court of Arizona (*supra*).

As shown by the foregoing findings of the Arizona Supreme Court, counsel for appellee Harmon, in preparing his abstract, caused to be inserted into it, just preceding the transcription of the "bill of exceptions," the statement that "the defendant by his bill of exceptions, which contained all the evidence taken on said trial." This statement the Arizona Supreme Court, in the first part of the findings above referred to, declares is not borne out by the record, but that on the contrary there is nothing in the record to show that it contains all the evidence which was introduced upon the trial of the case in the District Court.

Following the finding above referred to, the court further finds that the bill of exceptions was presented to the Judge of the District Court, and to appellant Crowe's attorneys, and that the said attorneys made no objection thereto, "but the record contains no certificate from the clerk of the court that the evidence contained

in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee."

Transcript of Record, page 63.

The presentation of the bill of exceptions to the opposite attorneys is provided for by our Statutes.

Revised Statutes of Arizona, year 1901, page 458, Paragraphs 1467-1468.

But there is no provision of the law that this submission to the opposite attorneys waives any objection the attorneys may desire to make to it on the score that it does not contain all the evidence, nor is there any presumption or reason for holding that this admission to the opposite attorneys cures any such defect in a bill of exceptions. Were it a statement of facts, there might be ground for such an argument. It is a settled rule of practice that bills of exception are presumed not to contain all the evidence.

Grand Trunk Ry. Co. vs. Ives, 144 U. S., 408; L. Ed., Vol. 36, p. 485 (488).

"The rule which we have often stated is that this court will not disturb the findings of the District Court as to the facts if there is any evidence fairly tending to support them."

Abernathy vs. Reynolds, 71 Pacific, 914 (Ariz.).
Curtis vs. Boquillas L. & C. Co., 71 Pacific, 924 (Ariz.).
Costello vs. Friedman, 71 Pacific, 937 (Ariz.).
Edwards vs. Simms, 71 Pacific, 902 (Ariz.).
Charoleau vs. Shields and Price, 76 Pacific, 821 (Ariz.).

Score vs. Griffin, 80 Pacific, 331 (Ariz.).
McCormick *et al.* vs. Ariz. Central Bank, 52 Pac., 469 (Ariz.).
Webber vs. Kastner, 53 Pacific, 207 (Ariz.).
Greene vs. Miller, 73 Pacific, 399 (Ariz.).
White vs. Brash, 73 Pacific, 445 (Ariz.).
Howard vs. Perrin, 76 Pacific, 460 (Ariz.).
Ryder vs. Leach, 77 Pacific, 490. (Ariz.).
Goldman vs. Sotelle, 60 Pacific, 696 (Ariz.).

It will be seen from an examination of the dates upon which these decisions were rendered that it was not intended by the Supreme Court of the Territory of Arizona that the case of Crowe vs. Harmon should change this rule, for the decisions in the first four cases just above cited were rendered upon the same date that the decision in the Crowe vs. Harmon case was rendered, viz: the 20th day of March, 1903. The fifth case (Charoleau vs. Shields and Price) was decided May 7, 1904, and the sixth case (Score vs. Griffin) was decided March 30, 1905. All, or nearly all, of the remaining cases were decided before the case of Crowe vs. Harmon.

From the foregoing authorities, we feel justified in arguing that there is no question but that it is the rule in Arizona that a bill of exceptions or statement of facts must affirmatively show that it contains all the evidence in the case, or the Supreme Court of Arizona will refuse to review the case upon questions of fact. It is apparent that the Supreme Court in this case did review the findings of the District Court, in the absence of a showing that all the evidence was before the Arizona Supreme Court; that it was led into believing all the evidence was before it by a statement of counsel for appellee, Harmon, that was not, and could not be, made a part of the record, so as to have any binding force or effect upon the court, and that the Arizona Supreme Court erred in

reviewing or disturbing the findings of the District Court upon the record before it in this case.

Assignment of Error No. 5.

This assignment is directed to the action of the Supreme Court of Arizona in making findings of fact that had the effect to exclude from the case relevant evidence, which was contained in the bill of exceptions, and the larger part of which had been admitted by the District Court without any objection being made to its admission. We can not find in the record any explanation of this action of the Arizona Supreme Court, and must conclude that in fact it also resulted from an oversight. The first conclusion of law of the Arizona Supreme Court contains the first of these objectionable findings. The conclusion is as follows: "That the trial court erred in finding as a fact that plaintiff, Crowe, between the 8th day of February, 1898, and the 11th day of January, 1900, brought about a sale of Neville's interest in the mine, because there was no evidence to sustain such finding."

Transcript of Record, page 64.

The objectionable finding is contained in the language: "Because there was no evidence to sustain such finding."

The effect of this finding is to exclude from the case, not only the evidence not in the record, but also to exclude a large amount of positive evidence given by the witnesses in the case, and contained in the bill of exceptions, such as:

"Q. Mr. Crowe, what did you do toward bring-

ing about the sale of the interest of Jerry Neville and N. H. Chapin in the Pride of the West mine? A. I secured the purchasers for the mine—Emerson Gee and A. R. Wilfley."

Transcript of Record, page 41.

"Mr. Crowe brought about the sale of the Pride of the West mine, and it was due to his efforts that the sale was effected."

Transcript of Record, page 43.

"Mr. Chapin agreed with Mr. Crowe that ten per cent was to be paid to Mr. Crowe for bringing about the sale."

Transcript of Record, page 44.

"I would not attempt to repeat all that was said at this conversation, but the proposition was made by Mr. Crowe and agreed to by Mr. L. Chapin, that he was to receive ten per cent of the amount of the sale price agreed upon."

Transcript of Record, page 44.

"I consider the services of Mr. Crowe in bringing about the sale of the Pride of the West mine worth the amount claimed for the Chapin and Neville interest and the amount he received from Olsen."

Transcript of Record, pages 44-45.

"The plaintiff, George W. Crowe, knowing that a change in the terms of purchase was liable to be made, had an agreement with Norman H. Chapin, in the presence and hearing of myself, on the dump of the Pride of the West mine, on or about the 30th day of March, 1899, as follows: Mr. Crowe stated

to Mr. Chapin and myself that in as much as the conditions of purchase were about to be changed, it was understood and agreed by and between Mr. Chapin (who also represented Neville), and the said Crowe, that in any deal made with myself and Gee by him and Neville, that the said Crowe was to receive ten per cent of any and all purchase money, as commission in negotiating the sale of their interest in the Pride of the West mine. In reply to this statement, Chapin stated to Crowe that that was his understanding; that the said Crowe was to have and receive ten per cent of any and all purchase money to be received by him for their interest in the Pride of the West mine, as a commission for making the sale."

Transcript of Record, page 46.

"George W. Crowe arranged and brought about the sale or option of the Pride of the West mine, as stated before."

Transcript of Record, page 47.

"The sale was perfected on the terms and conditions, as before stated, with permission to mine and ship ore by the payment of royalty. At the end of this year, Chapin and Neville had died, and I made an agreement with the administrators to extend the time with the privileges of making partial payments. At the present time, $50,000.00 has been paid, leaving $50,000.00 still due. The only change from the original terms was an extension of time and partial payments and no royalty."

Transcript of Record, page 48.

"I do not remember the exact words, but do remember that it was a clear understanding between Mr. Crowe and Mr. Chapin and myself that Crowe

was to receive ten per cent commission on any money I might pay to Mr. Chapin."

Transcript of Record, page 48.

The foregoing extracts are taken from the evidence of appellant Crowe and two of his witnesses, viz.: Emerson Gee and A. R. Wilfley. The testimony of these two witnesses was given by deposition, and the last payment of $25,000.00 to the estates each of Neville and Chapin was made after the evidence in the depositions was given.

The Supreme Court of Arizona found that Chapin was representing Neville in making the contract with Crowe.

Transcript of Record, page 58.

The evidence in the bill of exceptions also shows that immediately upon the consummation of the first agreement, Wilfley took possession, and up to the time of the trial of the case had continued in possession, constantly operating it.

"The mine has been operated steadily since we acquired possession of it, and is now being worked with a force of about fifty men. A mill and smelter have been erected, and are in operation steadily. Over a thousand feet of shafts, winzes and upraises have been driven in the mine. Tramways and roads have been constructed, and the mine is now being equipped with a hoisting plant and machine drills."

Transcript of Record, page 44.
(See Transcript of Record, page 49.)

And Trickey, the administrator of the Chapin estate, testified as follows:

> "Mr. Wilfley was in possession of the Pride of the West mine at the time I became administrator, and has been in possession ever since. Mr. Wilfley and the company have had possession right straight along. I knew, as everybody knew, that they had an option to purchase the mine and was working it, and a copy of the lease I found among the papers."
>
> Transcript of Record, page 51.

As before suggested, most of this evidence was admitted without objection, and it, and much more not quoted, is all a direct and positive refutation to the findings of the Arizona Supreme Court now being discussed. As a matter of fact, we can suppose that the Arizona Supreme Court made a mistake and overlooked this evidence; as a matter of law, there seems to be nothing left but to presume that the Supreme Court of Arizona excluded it.

The second conclusion of law of the Arizona Supreme Court makes a similar objectionable finding. The conclusion is as follows:

> That said court erred in finding as a fact that the said A. R. Wilfley paid to the said defendant, as such administrator, for the interest of the said Neville, the sum of fifty thousand dollars ($50,000.00), as follows: April 7, 1900, $500.00; June 19, 1900, $4,500.00; September 19, 1900, $5,000.00; December 19, 1900, $5,000.00; March 20, 1901, $5,000.00; June 17, 1901, $5,000.00; December 7, 1901, $25,000.00, because there was no evidence to sustain such finding.
>
> Transcript of Record, page 64.

The bill of exceptions shows that the appellee, Harmon, at the trial of the case in open court, admitted the receipt of the said sums of $500.00, $4.500.00, $5,000.00, $5,000.00, $5,000.00, $5,000.00 and $25,000.00.

Transcript of Record, page 50.

If the finding of the Supreme Court of Arizona is meant to indicate that Harmon received the said sums for the interest of the estate of Neville, as distinguished from "for the interest of the said Neville," then the numerous extracts from the evidence we have above quoted will show that there was evidence to sustain the findings of the district court, and that, while as a matter of fact, the Arizona Supreme Court may have overlooked it, as a matter of law, it must be considered to have excluded it.

Assignments of Error VI, VII, VIII and IX.

An extension of time was given in which to file the findings of fact of the Supreme Court of Arizona in this case, and they were not filed until May 10, 1905. The assignments of error had to be filed on or before March 15, 1905. In consequence, the assignments were made and filed before the findings of fact, and could not, and did not meet the findings as nearly as might be wished. As assignments of error 6, 7, 8, and 9 assert that the Supreme Court of Arizona erred in certain holdings on the evidence, this court will probably not consider them.

If this court could review all the evidence contained in the bill of exceptions, even though it does not contain all the evidence given at the trial, we believe that it would find that it abundantly supports the findings of the District Court, and that the preponderance and

weight of the evidence supports the findings of the District Court as against those of the Supreme Court.

We feel that the Supreme Court of the Territory of Arizona has erred in reviewing this case upon the facts. in reversing the judgment, and in ordering judgment entered for the appellee, and we think that these errors of the Supreme Court of Arizona are apparent of record in this case. We ask that the judgment of the Supreme Court of Arizona be reversed.

Respectfully submitted,

W. C. KEEGIN,
Attorney for Appellant

F. H. HEREFORD,
S. E. HAZZARD,
Of Counsel.

FILE COPY.

No. 70.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U.
FILED.
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JAMES H. McKENNE
Cl

GEORGE W. CROWE,

Appellant,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased,

Appellee.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE

EUGENE S. IVES.
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

GEORGE W. CROWE,

Appellant,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased,

Appellee.

STATEMENT OF FACTS.

Previous to March, 1900, a mine called the "Pride of the West," situated in Santa Cruz County, Territory of Arizona, was owned by three parties, one Olsen owning one-half thereof, and N. H. Chapin and Jerry Neville each owning one-fourth thereof.

In March, 1889, the appellant Crowe brought this mine to the attention of one Emerson Gee and one A. R. Wilfley, and in the latter part of that month Wilfley purchased Olesen's one-half interest, and entered into an agreement with Chapin and Neville by which he was granted an optional right to purchase their one-half interest, and pursuant thereto a deed to such one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed should be delivered to Wilfley upon payment by him of the sum of $100,000 in cash on or before April 1st, 1900.

It was verbally agreed prior to the execution of the deed and escrow agreement above mentioned, between Crowe and Chapin, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine, as commission for making the sale.

Prior to April 1, 1900, Chapin and Neville

both died, and M. M. Trickey was duly appointed administrator of Chapin's estate, and one Henry Harmon of Neville's estate.

Wilfley failed to pay the money and take up the property under the option, and after the 1st day of April, 1900, when such option lapsed, the deed which had been placed in escrow, was, in pursuance of the escrow instructions, returned to Harmon, as administrator of Neville's estate.

Thereupon negotiations were entered into between the administrators and Wilfley, and on April 7, 1900, upon the payment of $1,000 by Wilfley, the administrators of the two estates made another agreement with Wilfley by which they gave him an option to purchase the interest owned by the two estates, on certain terms and conditions, for the sum of $100,000. This option also lapsed.

After the lapsing of the last mentioned option, negotiations were again opened between Wilfley and the administrators, and on the 19th day of June, 1900, each of the administrators entered into an agreement with Wilfley by the terms of which each administrator gave an option to Wilfley to purchase the one-fourth interest owned by his intestate, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $50,000 in instalments as follows:

$5,000 within three months;
$5,000 within six months;
$5,000 within twelve months; and

$25,000 within eighteen months.

The appellant Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Neville.

Pursuant to the last mentioned options, Wilfley paid to each of the administrators the sum of $,5000 in cash on the 19th day of June, 1900, and the following sums on the following dates respectively:

$5,000 on September 19, 1900;

$5,000 on December 19, 1900;

$5,000 on March 20, 1901;

$5,000 on June 17, 1901; and

$25,000 on December 7, 1901.

Upon the payment of the full amount of $50,000 to each of the administrators above mentioned, each administrator conveyed the interest of his intestate to soid Wilfley.

On December 10, 1900, Crowe presented to each of the administrators, in accordance with the laws of the Territory of Arizona, a claim against each of the said estates for ten per cent of the purchase price of said property, being the sum of $5,000 in each claim, claiming the same as commissions for bringing about the sale to Wilfley.

Each administrator rejected the claim pre-

sented to him, whereupon Crowe brought action in the District Court of Santa Cruz County on January 25th, 1901, against each administrator to recover the sum of $5,000. Each of the estates was solvent and able to pay that amount, and no part of the $5,000 has ever been paid.

All of the agreements above mentioned, and particularly the last mentioned agreements between the administrators and Wilfley, under which purchase was finally made, were only options to purchase, and there was no obligation on the part of Wilfley to take the property or pay any portion of the purchase price, and no obligation on the part of either of the administrators to convey the interests of the intestates until the full purchase price had been paid.

The sale of the property that that was actually effected was the result of negotiations between Wilfley and the respective administrators, and Crowe rendered no services to either of the administrators, and took no part in the ultimate sale of the property.

The District Court gave judgment for Crowe for the amount claimed, from which judgment the respective administrators appealed to the Supreme Court of the Territory of Arizona, and that Court reversed the judgment of the District Court and remanded the causes, with direction in each that judgment be entered for the administrators.

From this judgment of the Supreme Court

of the Territory, Crowe prosecutes an appeal to this Court.

(Statement of Facts found by Supreme Court, Transcript of Record pages 58 to 65, folios 118 to 130.)

ARGUMENT.

I.

The first four assignments of error are to the effect that the Supreme Court of the Territory erred in considering the sufficiency of the evidence to sustain the judgment, for the reason as claimed, that the bill of exceptions does not purport to contain all of the evidence, and the greater part of appellant's argument is devoted to this proposition.

To this there are two answers:

First: That it does sufficiently appear from the record that all the evidence upon which judgment of the trial Court was based, was before the Supreme Court of the Territory.

Second: That no such question can be considered by this Court on appeal from the judgment of the Supreme Court of a Territory.

It is not disputed that the ordinary rule is that to review a decision upon a question of

conflict of evidence all of the evidence upon which that decision was based must be before the reviewing tribunal, and that it must so affirmatively appear from the record. When a decision upon a question of fact is to be reviewed upon a conflict of evidence, by a Court authorized to make such review, it must necessarily appear either by the certificates of the Judge, or some other form of authentication, that all the evidence bearing upon the subject decided is contained in the record presented for consideration. To this effect are the multitude of authorities cited and referred to in appellant's brief, and as applied to the ordinary case involving a decision of a question of fact upon conflict of evidence, or the propriety of directing a verdict, they are undoubtedly correct, But it is not essential that the certificate to the bill of exceptions shall state in so many words that all the evidence is contained therein, in order that the sufficiency of the evidence may be considered, if it appears otherwise from the record that all the evidence is actually before the Court.

The rule laid down in the cases cited by appellant is for the benefit of the Appellate Court, and designed to relieve the Court of the embarrassment of attempting to pass upon a question of fact, or the sufficiency of the evidence to sustain a finding of fact, without certainty that it has all of the evidence before it. Where the reason of the rule fails, the rule itself will not be applied, as in a case where the error claimed is the direction of a verdict for one party, and there is evidence in the bill which will warrant a verdict for the other.

Leslie v. Standard Sewing Machine Co., 98 Fed. 827.

So where the record, taken as a whole,, shows that all the evidence is before the Court, the reason of the rule likewise falls and the rule itself falls with it It is not the mere form of the certificate to the bill of exceptions, but the whole record that controls; and, if the record, taken as a whole, shows that the bill in fact contains all the evidence, it will be so considered, and a Court authorized to pass upon such matters will inquire upon the record as to the correctness of the decision sought to be reviewed.

Gunnison Co. v. Rollins, 173 U. S. 255.

Spangler v. Green, 21 Colo. 505, 42 Pac. 674.

Tested by the rule laid down in these cases, this record amply shows that all the evidence was before the Supreme Court of the Territory.

The bill of exceptions starts with the testimony of Crowe himself, contains his testimony upon examination and cross-examination; contains also the testimony of Gee and Wilfley; and then follows the statement "Plaintiff rested." Then follows the testimony of the administrator in his own behalf.

Within the ruling of this Court in Gunnison County v. Rollins, supra, this alone is sufficient to show that all of the evidence, at least

on behalf of the plaintiff, is contained in the bill of exceptions; but, in addition, the minute entries of the trial Court kept by its Clerk and constituting a part of the record (Transcript of Record, page 22), after setting forth some matters not here material, proceed as follows:

"The plaintiff, to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to-wit: George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant to maintain upon his part the issues herein, called as a witness the following named person, to-wit: M. M. Trickey, who was duly sworn, examined and cross-examined; and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted ,the same was by the Court taken under advisement."

Paragraph 1485 of the Revised Statutes of Arizona, 1901, provides:

> "Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence or offered in evidence and rejected by the Court need be incorporated in a statement of facts in order to make it a part of the record."

Paragraph 1582 of said Revised Statutes provides:

> "On taking an appeal * * * * the appellant * * * * shall cause to be filed in the Supreme Court * * * * the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the Clerk of the District Court, with the seal of the Court affixed that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case."

The Clerk, in compliance with this statute, transmitted all of the original records and copies of the minute entries to the Supreme Court, (p. 22, fol. 48). Therefore all documentary evidence was necessarily before the Supreme Court.

The original depositions of Wilfley and Gee, which were reduced to narrative form in the bill of exceptions, were before the Supreme Court and are now in the printed transcript of this Court (pages 23 and 32).

The minute entries show that only two witnesses were called and examined before the Judge, the plaintiff and Trickey, the administrator. The bill of exceptions contains the evidence of both the plaintiff and Trickey in narrative form. All the evidence adduced before the District Court must, therefore, have

been before the Supreme Court, unless a portion of the testimony of the plaintiff or of Trickey was omitted from the bill of exceptions.

Moreover, the inherent character of the evidence itself shows that it is all contained in the bill of exceptions. The whole controversy centered about the agreement made with Chapin, representing himself and Neville, on the one hand, and Wilfley on the other, and what was subsequently done under this agreement, and the agreement for commission between Chapin and Crowe.

Every person present at any of these negotiations was examined, and testified as to what took place, and the evidence relating to the subject was substantially without conflict. Looking at the bill of exceptions itself without reference to certificates, or other parts of the record, it can be readily seen that all the evidence possible to have been produced is contained therein.

Crowe and the two witnesses, whose depositions were introduced (Wilfley and Gee) testified to certain conversations and certain facts which are claimed to constitute proof of the cause of action alleged. All testified that they were the only persons present aside from those now deceased, at any of the negotiations or transactions involved, and all testified under the stimulus of an interest, Crowe and Wilfley testifying that Wilfley and his associates were interested in Crowe's commission and entitled to a part of it if recovered in this ac-

tion (Transcript of Record, page 42, folio 88; also page 49, folio 102).

It thus appears that Crowe and his two witnesses testified that they were the only persons except the deceased Chapin, who were present at an yof the transactions or conversations. Their testimony, as shown in the record, purports to be a complete statement of all that occurred or was said at any time bearing upon the issues involved, and is of such a character as to negative any suggestion that there might have been anything else said or done at such times by any other person present. Trickey was not present, and it would have been impossible for Trickey to have given any testimony which would have conflicted with the testimony offered by the plaintiff. Therefore, to presume that there might have been adduced upon the trial other material testimony would require the violent presumption that the plaintiff himself, in other and undisclosed portions of his testimony, completely contradicted his testimony and that of his own two witnesses, as it appears in the bill of exceptions.

Such evidently was the view taken by the Supreme Court of the Territory when it considered the evidence, and held that the conclusions which the District Court drew from it were entirely unwarranted. The case presented to the Supreme Court was not an ordinary case where it was claimed that an erroneous finding was made upon conflicting testimony, but simply a question whether from the uncontradicted testimony, the inferences of fact and law drawn by the District Judge were correct.

II.

The Supreme Court of the Territory, evidently intending to comply with the statute requiring that instead of evidence at large a statement of the facts in the nature of a special verdict shall be made and transmited to this Court, prepared the statement found on pages 58 to 65 of the record, folios 118 to 130.

It has inserted in the statement of facts (pages 69, 70 and 71 of the record) the entire findings made by the District Judge and certain statements as to the contents of the record.

It needs no argument to show that such matters are properly no part of the statement of facts required to be furnished to this Court. They are as out of place in such a statement as would be the pleadings if set forth in full in the findings of the District Judge. They must be regarded as superfluous and disregarded as findings of fact. The statement of facts in the nature of a special verdict should consist of a succinct statement of all the facts which the Supreme Court deemed established in the case and upon which it based its legal conclusion, and nothing more. To insert in such statement of facts a part of the record itself or the Court's conclusion as to the bill of exceptions, would be as improper as such matters would be in a special verdict, if one had been rendered. Eliminating these superfluous matters therefrom, a complete and sufficient statement of facts will be found in the record, though in a somewhat confusing form and with some repe-

titions, and it is the claim of the appellee that upon these facts alone, as found by the Supreme Court, the correctness of the judgment of the Supreme Court of the Territory must be determined.

Nothing is better settled than that the power of this Court upon appeal from a judgment of the Supreme Court of a Territory, in a case not tried by a jury, is limited to determining whether the facts found by the Supreme Court sustain its judgment, and whether there is error in the admission or rejection of evidence.

Holloway v. Dunham, 170 U. S., 615.

Karrick v. Hannaman, 168 U. S., 328.

Harrison v. Perea, 168 U. S., 311.

Young v. Amy, 171 U. S., 179.

No questions of the rejection or admission of evidence are presented in this case, as no evidence was rejected that was sought to be introduced by the plaintiff. The errors in the admission or rejection of evidence which this Court is authorized to review are, of course, those alleged to have been committed at the trial. The appellate court neither admits nor rejects evidence, and its consideration of the sufficiency of the evidence against objection is not the admission of evidence within the meaning of the authorities above cited.

The power of the Court, therefore, in re-

viewing this case must be limited to the question whether the facts as found by the Supreme Court of the Territory warrant its conclusion and the judgment based thereon. Had the certificate to the bill of exceptions stated that all the evidence was contained therein, and the Supreme Court found facts as it has, and the evidence was wholly insufficient to sustain the findings of fact, or if such findings were entirely contrary to undisputed evidence, this Court, however much it might regret its inability to do so, would be powerless to go behind the findings and find new facts or determine the sufficiency of the evidence to sustain those found by the Supreme Court of the Territory.

Young v. Amy, 170 U. S., 179.

The rule is repeatedly and consistently asserted by this Court that, except for the purpose of reviewing alleged errors in the admission or rejection of evidence, it is limited to a consideration of the facts found by the Territorial Supreme Court, and cannot look behind such findings either for the purpose of determining the sufficiency of the evidence to sustain them, or the propriety of considering any evidence not subsequently made the basis of an assignment of error as to its admission or rejection. Within the rule established by the authorities above cited and by the unbroken line of decisions of this Court in such appeals, the facts found by the Supreme Court of the Territory must be taken as true, and from them must be determined the correctness of the judgment appealed from, regardless of the

state of the evidence or of the record containing it.

III.

The following findings of the Supreme Court are deemed conclusive against the plaintiff's claim:

> "That the sale of the property that was subsequently affected was the result of the negotiations between Harmon, the administrator of Neville's estate, and Wilfley; that before the date of the sale Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Neville.
>
> "That in regard to the latter negotiations, Crowe rendered no services to Harmon, received no appointment or agreement from Harmon in reference to the matter, and took no part whatever in the ultimate sale."
>
> (Page 63, folio 128.)

The Supreme Court, in its opinion in the case of Crowe vs. Trickey, commenting upon this fact, said:

> "The sale that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley. Crowe's power or authority to act in this matter had, before the date of

this transaction, been terminated and his agency revoked by the death of Chapin, and he could have no further right or interest therein by virtue of the agreement of March, 1899, between him and Chapin.

There is no claim on his part that he was consulted by either the vendor or vendee in the latter negotiations, He rendered no service to Trickey, received no appointment or agreement from Trickey in reference to the matter, and the fact that his former efforts to effect the sale, while he failed in its completion, might have tended to assist Trickey in perfecting it, or might have, to a great extent, rendered possible the consummation of such sale will not suffice to establish a claim on his part against the estate of Chapin for commission on a sale that Trickey accomplished without his service."

Upon the facts as found Crowe did not earn his commissions and is not entitled to recover, for the following reasons:

First: The escrow agreement executed in pursuance of Crowe's efforts was an option, and he was not entitled to any commissions by reason thereof, except upon the contingency that the purchaser whom he had secured should avail himslef of such option.

The principle is that, if the purchaser is absolutely bound and is accepted by the seller, the broker has earned his commissions; but, i fthe purchaser has the right to withdraw and forfeit his earnest money, and does withdraw, the broker is not entitled to his commissions.

If the vendor has the right, either to declare a forfeiture in case of the default of the purchaser upon deferred payments, or to proceed against a purchaser upon deferred payments, then the broker has earned his commissions, even though the vendor should elect to declare the forfeiture. But, the essential foundation of the earning of commissions by the broker, is the fact that he has secured a purchaser who has either bought or obligated himself to buy the property and pay for it, and unless such obligation exist, there is no sale and no earning of commissions. This principle is recognized by the authorities of all States.

Kimberly v. Henderson, 29 Md., 512;

Ramsey v. West, 31 Mo. App., 676;

Zeidler v. Walker, 41 Mo. App., 118;

Levy v. Kottman, 32 N. Y. S., 241;

Jenkins v. Hollingsworth, 83 Ill. App. 139.

Brackenridge v. Claridge, 44 S. W., 819.

Therefore, upon the death of Chapin and

Neville, Crowe had a contingent right to his commissions, dependent upon Wilfley's availing himself of the option and paying $100,000 before the 1st of April, 1900. When Wilfley failed to make this payment the contract which had been negotiated by Crowe fell through, and his right to commissions fell with it.

Second: There is a line of authorities which hold that when a broker has procured a purchaser and introduces him to his employer, the vendor, the broker may recover his commissions if subsequently the vendor sells to the purchaser so secured by the broker, even upon somewhat different terms from those which had been discussed between the vendor and the broker.

These authorities, however, rest absolutely upon the principle that the contract between the principal and agent was a continuing one, and was in existence at the time when the final deal was consummated. The principal may at any time, if acting in good faith terminate the contract with the proker and revoke his authority and if before any deal should be consummated the principal should so revoke the authority of the broker, then the broker would have no right to commissions by reason of any sale thereafter consummated by the principal.

The only restriction upon the right of the principal to revoke is that the revocation must be in good faith, and whether it was made in good faith, or was a mere device to defraud the broker of his commissions, is a question of fact,

and the broker in any litigation would have the right to have such question of fact submitted to the jury

It is confidently submitted that in all cases where the principal has revoked the contract before the broker has earned his commissions, the broker's right to commissions is absolutely cut off, except where it has been found as a fact that such revocation was a mere device to defraud the broker of his right to commissions.

Sibbald v. Beth. Iron Co., 83 N. Y., 378

Beal v. Creswell, 3 Md., 196.

Zeimer v. Antisel, 17 P., 642.

Armstrong v. Wann, 12 N. W., 345.

Satterthwait v. Vreeland, 48 How. Pr. 508.

Carlson v. Nathan, 43 Ill. App., 364.

Buehler v. Weiffenbach, 46 N. Y. S., 861.

O'Toole v. Tucker, 40 N. Y. S., 695.

Pryor v. Jolly, 40 S. W. 959, reversing the same case reported 39 S. W., 1019.

Antisdell v. Camfield, 77 N. W., 944.

Third: The right of the principal to re-

voke is absolute. The language of the Court in Sibbald v. Bethlehem Iron Co., supra, at page 384, upon this subject, is as follows:

> "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith * * * * * The right of the principal to terminate his authority is absolute and unrestricted, except only that he must only do it in good faith and not as a mere device to escape the payment of the broker's commissions."

The interest arising from commissions is not such an interest as will render the authority irrevocable.

Stier v. Imp. Life Ins. Co., 58 F., 843;

Barr v. Schroeder ,32 Cal., 609;

Chambers v. Seay, 73 Ala., 372.

An interest in the proceeds does not render the authority irrevocable.

Hamilton v. Frothingham, 58 Mich., 253;

Greene v. Cole, 103 Mo., 70;

Coffin v. Landis, 46 Pa. St., 426.

Shisler's estate, infra.

Fourth: It is a well established rule of the common law that the death of the principal puts an end to the agency when the authority is not coupled with an interest.

1 Am. and Eng. Enc. of Law, 1223.

Boone v. Clark, 3 Cranch, 389.

> "To constitute a power, coupled with an interest and property in the thing itself, the subject of the agency or power must be vested in the person to whom the agency or power is given."

In the language of Chief Justice Marshall, "The power must be engrafted on an estate in the thing."

Hunt vs. Rousmanier, 8 Wheaton, 174.

Thus an interest arising from commissions or the proceeds of a transaction, is not an interest which will prevent revocation.

Walker v. Walker, 125 U. S. 339, and cases cited, supra.

That death revokes the agency in the case of principal and broker has been directly held in Shisler's Est., 2 Pa. Dis. Reps., 588, and in Scruggs v. Driver, 31 Ala., 274.

Upon the death of Chapin and Neville, Crowe ceased to be a broker, and had no rights

except as has been said upon the contingency of Wilfley availing himself of the escrow agreement of April 1, 1900.

V.

The case of Pryor v. Jolly, supra, is directly in point. In that case the vendor agreed that if a purchaser "takes 1,500 head of cattle at $17 per head cash" he would pay the broker who had procured the purchaser a commission of $1 per head. The purchaser took the cattle and paid $8,500 in cash, and the balance in a promissory note due four and one-half months after date, with interest at the rate of ten per cent, the note to be guaranteed by the State National Bank, Denver, Colo., by telegram or letter.

The court held, that the contract to pay the broker his commission was contingent upon all cash being paid; although the trade as consummated was substantially a cash trade, it was not an absolute compliance with the contingency, and that the broker was not entitled to recover.

VI.

Crowe has no equities in this case. Wilfley the purchaser, was co-owner with Chapin and Neville, having already acquired a one-half interest in the mine from Olsen.

Plainly, if Wilfley had not availed himself of the option of the escrow agreement, Crowe would have had no claim to recovery.

The contention that after the expiration of such option the administrators might never sell the property to Wilfley, who already owned one-half of it, without subjecting themselves to a liability to pay Crowe ten per cent of any price which Wilfley might pay them for the mine, would be to deprive the administrators from making a sale to the natural and probable purchaser of their property. This contention is forcibly disposed of by the learned judge who rendered the decision in the case of Sibbald v. Bethelehem Iron Co., in the following language:

> "The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk Railway, except on condition of paying a commission to the plaintiff. . * . . * . . * There could be no sale thereafter which would not be as much due to such original act of the broker as the one in question.
>
> "It can always be said with equal truth that the Iron Company was availing itself of the fruits of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent."

Neville's contract could never go further than an agreement to pay the broker for pro-

curing a purchaser upon a price and terms to which he (Neville) would assent. Neville's terms were embodied in the escrow agreement.

It can not be assumed that Neville would ever have assented to the agreement which the administrator made.

Neville's estate can only be bound by Neville's contract, and his contract can only be of binding effect upon proof that his mind assented to the terms of a trade which was consummated. Of this, there is no evidence whatever.

VII.

The testimony of the plaintiff and his witnesses is that Wilfley and Gee were to receive two thirds of Crowe's commissions (Transcript of Record pages 45 and 52).

Against the contention of the defendant the Court has found that Chapin and Neville agreed to pay Crowe a commission. By force of such agreement Crowe became their agent.

His whole efforts and services were due to Chapin and Neville, and the fact that unknown to them, he had a confidential relationship with Wilfley and Gee, would debar him from recovering any commission for services against Chapin and Neville.

The duty of a broker employed by a vendor, is not only to secure a purchaser, but to get the best possible price for his employer, and this duty is inconsistent with any confid-

ential relationship between himself and the other side.

The principle is well stated as follows:

> "Where an agent has acted for both parties to a contract, he cannot recover compensation from one of them to whom the double agency was unknown."

The decisions go even farther, and hold that an agent cannot claim remuneration from either party unless it is clearly shown that both parties knew and assented to the agreement.

1 Am. and Eng. Law, 2d Ed., 1113.

Robbins v. Sears, 23 F., 875.

VIII.

The claim against the estate was presented on December 10, 1900, and this action was commenced on January 25, 1901. The parties stipulated upon the trial as to the dates that payments of purchase price were made. So as to those facts the condition of the bill of exceptions is immaterial. It appears by such stipulation (page 53) that on December 10, 1900, when the claim was presented to the administrator, only $10,000. had been paid to him, and that between such time and the commencement of the suit, an additional $5,000. and no more had been paid to him. At the times when the claim was presented and the suit was commenced the purchaser was under no obligation to make any further payments. This is not

denied. Crowe's right to recover, if any existed, was entirely contingent upon Wilfley paying the remaining portion of the purchase price. His claim against the estate was not even an absolute claim that was not due. It was a claim that was both contingent and undue.

The fact that since the commencement of the actions the facts have happened which turn this contingent right into an absolute one, can have no bearing whatever upon the right of the plaintiff to recover in these actions.

The complaint to be good must show a cause of action in favor of the plaintiff and against the defendant at the time the action is commenced. The complaint relates to the time of the commencement of the action, and the rights of the plaintiff are to be determined as they existed when suit was commenced.

4 Ency. Pl. & Pr. p. 605.

This rule is elementary and unqualified.

Maynard v. Talcott ,11 Barb., 569.

McGrane v. Elevated R. R. Co., 73 N. Y. S., 506.

It cannot be contended that there is anything in the Arizona statute which provides for the adjudication of a contingent or undue claim by suit against the estate of a decedent. It is true that the Revisd Statutes of 1887, which were in operation when this suit was brought, provide that "all claims arising

upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." (Paragraph 1110..)

It was thus necessary for the claimant to present his claim, but this did not give him the right to sue upon it unless it were both absolute and due. The statute further says:

"If the claim be not due when presented, or be contingent the particulars of such claim must be stated." The plaintiff failed to comply with this provision.

The procedure of the plaintiff in such a case as this is especially provided for. Paragraph 1115 reads as follows:

> "When a claim is rejected either by the executor or the administrator, or the Probate Judge, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection if it be then due, or within two months after it becomes due. Otherwise the claim is forever barred."

It was the plain duty of the plaintiff under the law and the statute to wait until his contingent claim should have become an absolute one through the payment of the purchase price by Wilfley, and then to commence his suit within two months thereafter.

Section 1121 of the statutes providing that a judgment against an executor or an administrator only establishes the claim in the same manner as if it had been allowed by the executor, and that the "judgment must be that the executor pay in due course of administration the amount ascertained to be due," upon its face, applies only to such claims as are due. In any event, therefore, the judgment of the District Court was erroneous and should have been reversed.

IX.

The judgment of the Supreme Court of the Territory should be affirmed.

Dated Tucson, Arizona, October 27th, 1906.

EUGENE S. IVES,
Counsel for Appellee.

Supreme Court of the United States.

No. 71.—October Term, 1906.

George W. Crowe, Appellant,
vs.
M. M. Trickey, Administrator of the Estate of Norman H. Chapin, deceased.

Appeal from the Supreme Court of the Territory of Arizona.

[January 21, 1907.]

This was an action brought by Crowe in the District Court of Santa Cruz County, Arizona, against Trickey, administrator of the estate of N. H. Chapin, deceased, to recover the sum of five thousand dollars as commission on a sale alleged to have been effected by Crowe for Chapin, during his life, of a one-fourth interest in a mine. The case was tried by the District Court without a jury, a jury having been waived by agreement of the parties, and that court made findings of fact and stated conclusions of law therefrom, upon which it rendered judgment in Crowe's favor, January 10, 1902, to be paid in due course of administration. From that judgment the case was carried by appeal to the Supreme Court of the Territory of Arizona, which, March 20, 1903, reversed the judgment, and remanded the case to the District Court, with directions to render judgment for defendant. 71 Pac. Rep. 965.

The record states:

"In the above entitled action the Supreme Court finds the facts to be as follows:

"I. Previous to March, 1899, a mine known as the Pride of the West Mine was owned by three parties. A man named Olsen owned one-half thereof, and Norman H. Chapin, the defendant's intestate, and Jerry Neville each owned one-fourth interest therein.

"In March, 1899, the plaintiff Crowe brought this mine to the attention of one Emerson Gee and his associate A. R. Wilfley. Subsequently, in the latter part of March, 1899, Wilfley purchased Olsen's one-half interest, and made an agreement with Chapin and Neville, in pursuance whereof a deed to the remaining one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of $100,000 in cash, on or before the 1st day of April, 1900.

"II. It was verbally agreed between Crowe on the one part, and Chapin on the other, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine, as commission for making the sale. Such deed and escrow

agreement were executed by Chapin and Neville on the 1st day of April, 1899.

"III. Prior to the 1st day of April, 1900, Chapin and Neville both died.

"M. M. Trickey was appointed administrator of Chapin's estate and one Henry H. Harmon was appointed administrator of Jerry Neville's estate.

"Wilfley failed to pay the money and take the property under his option, and after the 1st day of April, 1900, at the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey, the administrator of Chapin's estate.

"IV. Thereafter, and on the 7th day of April, 1900, upon the payment of $1,000 by Wilfley, the administrators of these two estates made another agreement with Wilfley, by the terms of which they agreed to execute a deed to a one-half interest owned by the two estates, upon the payment of the purchase price of $100,000, in specific amounts, on different dates therein expressed. This option also lapsed.

"V. After said lapse, and on the 19th day of June, 1900, M. M. Trickey, as administrator of the estate of Chapin, entered into another agreement, which was offered in evidence by the plaintiff, and appears in the bill of of exceptions as 'Exhibit 3.'

"By this agreement, Trickey as administrator, gave to Wilfley an option to purchase the one-fourth interest in the mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $5,000 in cash, $5,000 within three months; the further sum of $5,000 within six months; the further sum of $5,000 within nine months; the further sum of $5,000 within twelve months; and the further sum of $25,000 within eighteen months.

"The plaintiff Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Chapin.

"VI. In pursuance to this option, Wilfley paid to Trickey the sum of $5,000 in cash on the 19th day of June, 1900; and the following sums on the following dates, respectively: $5,000 on September 19, 1900; $5,000 on December 19, 1900; $5,000 on March 20, 1901; $5,000 on June 17, 1901; $25,000 on December 7, 1901.

"VII. The above mentioned agreement (Exhibit 3) was only an option to purchase, and under it there was no obligation on the part of Wilfley to pay any portion of the purchase price, and no obligation on the part of Trickey to deliver the deed mentioned in the agreement until the last payment of $25,000 in December, 1901, had been made.

"VIII. On the 10th day of December, 1900, Crowe presented to Trickey, as administrator of Chapin's estate, in accordance with the law of the Territory of Arizona, his claim against the estate of Chapin for 'Ten per cent. of the purchase price of the Pride of the West Mine, agreement for the sale of which was entered into about April 1st, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive ten per cent commission upon said purchase price from said Chapin and Neville, one-half of said ten per cent being $5,000.'

"IX. This claim was rejected by the administrator, and he thereupon brought this action in the District Court of Santa Cruz County on the 25th day of January, 1901, at which time the estate of N. H. Chapin, deceased, was solvent, and amply able to pay all debts of the said estate, and the said Chapin nor the said Trickey nor any one else had paid to the plaintiff the said sum of $5,000, or any part thereof, or anything on account thereof.

"The case was tried before the court, without a jury, a jury having been by agreement of parties waived, and the court made the following findings of fact:

[Here follow findings of fact and conclusions of law by the District Court, upon which judgment was rendered in favor of the plaintiff, and an appeal prayed therefrom to the Supreme Court as stated.]

"The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all of the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona. The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions, which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions reciting the testimony of the different witnesses, covering some 23 pages, and at the conclusion thereof the following allowance:

'The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same date submitted to Messrs Hereford & Hazzard, attorneys for the opposite party, who made no objection thereto, whereupon the said bill of exceptions is now by me signed, approved and allowed as of the said 24th day of January, 1902. Geo. R. Davis, Judge,' but the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee.

"The Arizona Supreme Court found the following facts:

"I. That the efforts of the plaintiff Crowe resulted in procuring the purchaser Wilfley not to purchase absolutely, but to take an option on the purchase of the property involved, for one hundred thousand dollars; that Crowe's principals accepted a deed to the property and placed it in escrow; that although Chapin died before the expiration of that escrow agreement, the deed executed by him remained subject to the order of the purchaser, and that if he had availed himself of the terms of that agreement, the sale would have been completed and plaintiff Crowe would have been entitled to his commission, but that Wilfley failed to make the payment and take up the deed, and, after the expiration of the option and after Chapin's death, the deed was returned to the administrator of Chapin's estate and the transaction was closed without any sale being made.

"II. That the sale of the property that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley; that before the date of the sale, Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Chapin.

"III. That in regard to the latter negotiations, Crowe rendered no services to Trickey, received no appointment or agreement from Trickey in reference to the matter, and took no part whatever in the ultimate sale.

"IV. That the plaintiff Crowe did not, between the 8th day of February, 1898, and the 11th day of January, 1900, bring about a sale of Chapin's interest in the property in controversy.

"V. The said A. R. Wilfley paid to the said defendant the sum of fifty thousand dollars, as follows; April 7, 1900, five hundred dollars; June 19, 1900, four thousand five hundred dollars; September 19, 1900, five thousand dollars; December 19, 1900, five thousand dollars; March 20, 1901, five thousand dollars; June 17, 1901, five thousand dollars; December 7, 1901, twenty-five thousand dollars, not for the right, title and interest of the said Norman H. Chapin but for the 'right, title and interest of the said estate of Norman H. Chapin, deceased, in and to' the said property, in compliance with the terms of the contract of sale and title bond executed to the said Wilfley by Trickey, the administrator of said estate."

[Here follow conclusions of law and judgment.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

The Supreme Court of the Territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 168 U. S. 311; *Young* v. *Amy*, 171 U. S. 179.

The statement of facts required by the statute should present clearly and precisely the ultimate facts. And while it may be objected to the statement in this case that it does not properly comply with that rule, for it is quite confused and gives a mass of unnecessary details, yet we think the imperfections in that regard should not be held fatal as a sufficient statement finally emerges. This will be understood by reference to the statement itself, which we have set forth for that purpose.

The bill of exceptions contains some minor rulings on questions propounded to witnesses, but the exceptions thereto were not insisted upon in the Supreme Court nor considered by that tribunal, so that the question before us is whether the findings of fact support the judgment.

But several of the errors assigned are to the effect that the Supreme Court erred in considering or determining the case upon questions of fact, because the bill of exceptions failed to state that it contained all of the evidence given in the case, and the record failed "to show that the bill of

exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision" of the court.

The Supreme Court proceeded upon the record as containing all the evidence and we are not inclined to hold that the contention that it should not have done so is open to our consideration under the limitations of the statute. But, be that as it may, we think the record shows that all the evidence was contained in the bill of exceptions and that that is sufficient, even though the bill itself did not so state in express terms. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255.

Paragraphs 1485 and 1582 of the Revised Statutes of Arizona, 1901, (pp. 461, 474,) provide:

"Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the court, need be incorporated in a statement of facts in order to make it a part of the record."

"On taking an appeal . . . the appellant . . . shall cause to be filed in the Supreme Court . . . the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the clerk of the District Court, with the seal of the court affixed, that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case. . . ."

The clerk accordingly transmitted to the Supreme Court all of the original records and copies of the minute entries. The case, coming on for hearing, the minute entries state:

"The trial then proceeded upon the pleadings herein, in the presence of and before the court sitting without a jury, a jury having been expressly waived in open court by both parties hereto, and the plaintiff to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to wit, George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant then, to maintain upon his part the issues herein, called as a witness the following named person, to wit, M. M. Trickey, who was duly sworn, examined and cross-examined, and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted, the same was by the court taken under advisement."

The evidence of two witnesses, Wilfley and Gee, was taken by deposition, and their depositions were sent up in the transcript. The minute entries show that only two witnesses, Crowe and Trickey, administrator, were examined before the court, and their testimony is given in narrative form in the bill of exceptions, as well as the testimony of Wilfley and Gee. The minute entries, in speaking of the introduction of "documentary

evidence," were manifestly intended to embrace depositions in that term. There is no room for presuming that any evidence was omitted, and the points to which the evidence adduced was addressed preclude such a suggestion.

We are brought then to the question of the sufficiency of the facts found to support the judgment. The findings may be summarized as follows:

Chapin and Neville each owned one-fourth of the mine, and on April 1, 1899, signed a paper addressed to the Consolidated National Bank of Tuscon, Arizona, which is contained in the bill of exceptions, and, by reference, in the statement of facts, and was couched in these terms:

"GENTLEMEN: The enclosed deed from N. H. Chapin, Marie Chapin, Jerry Neville and Refugia Neville, parties of the first part, to Arthur R. Wilfley, party of the second part, is to be delivered to the said Arthur R. Wilfley upon the payment of the sum of one hundred thousand dollars at or before the expiration of one year from the date hereof.

"And you are further directed that all moneys sent you from time to time by the said Arthur R. Wilfley, with instructions to apply the same to the payment of the aforesaid purchase money, shall be so applied and the same placed to the credit of N. H. Chapin and Jerry Neville.

"Therefore, if the said Arthur R. Wilfley shall pay or cause to be paid the sum of money above mentioned, at or before the time aforesaid, you will then deliver the said deed to the said A. R. Wilfley, his agent or assigns. Otherwise the said deed is to be held subject to the order of the said N. H. Chapin and Jerry Neville.

"Dated Washington, Arizona, April 1st, 1899."

This paper and the deed therein mentioned were deposited in escrow in the bank on that day.

The terms of the transaction had been arranged the latter part of March, and it was verbally agreed that Crowe should receive ten per cent commission on the purchase money received by Chapin and Neville.

Chapin died January 11, 1900, and Trickey was appointed administrator February 8, 1900, and qualified as such. Neville died January 3, 1900, and Harmon was appointed administrator and qualified as such.

Wilfley failed to pay the money and take the property, and after the expiration of the time mentioned in the escrow agreement the deed in escrow was returned to Trickey, administrator.

On April 7, 1900, the administrators of the two estates made an agreement with Wilfley to execute a deed to the half interest on payment of $100,000, in amounts prescribed.. This option also expired. Thereafter, and on the 19th of June, 1900, Trickey, as administrator of the estate of Chapin, entered into an agreement with Wilfley to convey to him the right, title and interest of the estate of Chapin in the mining property (described as a quarter interest), on payment of $50,000, in designated amounts, and these payments were subsequently made.

Crowe had nothing whatever to do with either of the last-mentioned options, or with the sale of the property after the death of Chapin.

And the claim he presented to Trickey as administrator of Chapin's estate was for $5,000, being one-half of the commission agreed to be paid to him in March, 1899, on the purchase price which would have been received by Chapin and Neville if the option of April 1, 1899, had been carried out.

In these circumstances we concur in the judgment of the Supreme Court of the Territory.

In *McGavock* v. *Woodlief*, 20 How. 221, it was laid down that in order to be entitled to commission "the broker must complete the sale, that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on." But this rule is inapplicable when the owner refuses, without sufficient reasons, to fulfill the agreement which the agent has made. *Kock* v. *Emmerling*, 22 How. 69. Even though he could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. *Holden* v. *Starks*, 159 Mass. 503. Or when the agent's authority is revoked in bad faith before the completion of the sale. *Sibbald* v. *Bethlehem Iron Company*, 83 N. Y. 378. In this case the subject was much considered, and Finch, J., in delivering the opinion of the court, said, among other things:

"It is the established rule that a broker is never entitled to commissions for unsuccessful efforts. . . . The broker may devote his time and expend his money with ever so much devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions, and in such event it matters not that after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to, and materially assist in, the consummation of a sale. . . . This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. . . . One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed, by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, having been granted him, the right

of his principal to terminate his authority is absolute and unrestricted, except the payment of the broker's commissions. . . .

"If, after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

In the present case what Crowe had obtained was not an absolute contract of purchase, but an option on the purchase

The deaths of Chapin and Neville terminated the authority of Crowe to sell on commission, which was not a power coupled with an interest, that is, an interest in the property on which the power was to operate. *Hunt* v. *Roushanier*, 8 Wheat. 174; *Walker* v. *Walker*, 125 U. S. 339.

Nevertheless, up to the first of April, 1900, if Wilfley had availed himself of the terms of the escrow agreement, the sale might have been completed and Crowe have been entitled to his commission, but Wilfley did not do so, and the deed held in escrow was returned in accordance with the terms of that agreement.

There is no legal basis for the imputation of bad faith, and it is not pretended that Crowe was employed by Trickey or rendered any service to him in the matter of the sale. The bare fact that what he had done in the former negotiations may have contributed to the accomplishment of the sale by Trickey is not enough to sustain his claim for the commission sued for.

Judgment affirmed.

No. 70.

George W. Crowe, Appellant, vs. Henry Harmon, Administrator of the Estate of Jerry Neville, deceased. } Appeal from the Supreme Court of the Territory of Arizona.

Mr. Chief Justice Fuller: This case is identical in all essential respects with that just decided, and must take the same course.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.